UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

TPI IOWA, LLC,
Respondent

and

Cases 18-CA-164749
18-CA-168532

DOUGLAS VOLLERS II,
an Individual

Matthew J. Turner, Esq.
for the General Counsel.

Michael A. Paull, Esq. and Joshua D. Holleb, Esq.
for the Respondent.

DECISION

STATEMENT OF THE CASE

SHARON LEVINSON STECKLER, Administrative Law Judge. This case was tried in Des Moines, Iowa on April 13 through 15 and May 10 and 11, 2016. Douglas Vollers II (Vollers II), an individual, filed Charge 18-CA-164749 against Respondent TPI Iowa, LLC (Respondent) on November 23, 2015 and amended the charge on December 11, 2015. He filed Charge 18-CA-168532 against Respondent on January 27, 2016. The General Counsel issued the complaint on February 19, 2016 and amended the complaint on March 1, 2016. Respondent filed timely answers in which it denied all wrongdoing.

Most of the complaint allegations relate to an organizing campaign that took place during the summer of 2015.[1] The complaint alleges Respondent terminated two employees and gave several others various levels of disciplinary action in violation of Section 8(a)(3) of the Act. The complaint also alleges various violations of Section 8(a)(1), including threats and coercion. In addition, the complaint alleges that Respondent violated Section 8(a)(1) by maintaining and enforcing handbook provisions, including solicitation, social media, and access to the facility.

[1] Unless otherwise noted, all dates here occurred in 2015.

The parties were given a full opportunity to participate in the hearing, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, including my observation of the demeanor of the witnesses, and after carefully considering the briefs filed by General Counsel and Respondent, I make the following

FINDINGS OF FACT[2]

I. JURISDICTION

Respondent, a Delaware limited liability company with an office and place of business in Newton, Iowa, has been engaged in manufacture and production of wind turbine blades. In conducting its operations during the calendar year ending December 31, 2015, Respondent sold goods and services valued in excess of $50,000, directly to customers located outside the State of Iowa. Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. The International Brotherhood of Electrical Workers has been a labor organization within the meaning of Section 2(5) of the Act.

II. BACKGROUND

In this section, I will discuss the facility personnel, the manufacturing process for the turbine blades, and the history of the unionization efforts at the facility. I then provide a short framework for examining the facts and allegations in the decision.

A. Facility Personnel and Disciplinary Procedures

The facility employs 900 employees and runs three shifts with approximately 240 people per shift. Facility turnover for year 2015 was 45 percent. Employees report to supervisors. The

[2] Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather upon my review and consideration of the entire record for this case. My findings of fact encompass the credible testimony, evidence presented, and logical inferences. The credibility analysis may rely upon a variety of factors, including, but not limited to, the context of the witness testimony, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 303–305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings regarding any witness are not likely to be an all-or-nothing determination and I may believe that a witness testified credibly regarding one fact but not on another. *Daikichi Sushi*, 335 NLRB at 622.

When a witness may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. *International Automated Machines,* 285 NLRB 1122, 1123 (1987), enfd. 861 F.2d (6th Cir. 1988). This is particularly true where the witness is the Respondent's agent. *Roosevelt Memorial Medical Center,* 348 NLRB 1016, 1022 (2006). Testimony from current employees tend to be particularly reliable because it goes against their pecuniary interests when testifying against their employer. *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978); *Georgia Rug Mill*, 131 NLRB 1304 fn. 2 (1961); *Gateway Transportation Co.*, 193 NLRB 47, 48 (1971); *Federal Stainless Sink Division*, 197 NLRB 489, 491 (1972).

employees also work with hourly employees now called process coordinators (formerly known as team leaders). Process coordinators are considered experts in their area. They have daily check lists for employees and assign tasks at the beginning of the shifts.

The facility's General Manager is Terry Van Huysen. Operations Manager Allen Finchum reports to Van Huysen. Production Manager for Finishing and Components Ken Beck, production manager for finishing and components, reports to Finchum. Ken McGlothlin, the maintenance manager, reports to Tony Pressgrove, the equipment engineering maintenance manager.

Also reporting to Van Huysen is Human Resources (HR) Manager Cleodis Boyd. Boyd's employment with Respondent began in May 2014. At the time of these events, Reggie McDade was a contract HR Resource. Tahler Wildman was the HR generalist on the first shift. Emily McMahon was a Human Resources Generalist and Respondent admitted she was an agent within the ambit of Section 2(13) of the Act.[3]

Boyd's responsibilities for discipline are to lead the process and development and training of the management staff. No one is allowed to terminate without Boyd's input, but others may discipline without his input. He usually does not get involved unless suspension or termination is the disciplinary action. Boyd testified almost every day he reviews the disciplinary action log, which is an Excel spreadsheet listing employees alphabetically and with corresponding disciplines in order of date; thus, an individual with more discipline takes up more lines in the log. The log itself is 85 pages. In making decisions about discipline, the individual's alleged infraction and severity are examined. The previous pattern of discipline also is examined and compared to the current alleged infraction. Boyd testified that Respondent looks for other patterns and other employees to ensure consistency and fairness, plus potential charges for discrimination in a protected class, length of service, and mitigating factors. Boyd also differentiated between "willful" and "non-willful" violations, particularly with safety violations: "Willful" was knowingly violating a rule or policy, which was more serious than mistakenly or inadvertently doing something.

B. Respondent's Manufacturing Process

Respondent's facility is 340,000 square feet. The plant floor includes lanes for pedestrian traffic and vehicles traffic. The vehicles moving include bicycles, fork trucks, and other mechanized vehicles. Video cameras, taking color videos survey the entire facility, including the plant floor, offices and break rooms; the videos are retained for two weeks.

Respondent produces 24 wind turbine blades per week for their only customer, General Electric. Each finished blade is approximately 180 feet long. Respondent runs five molds in six mold areas, which produces two halves of the blade, or shells. The molding process takes 24 to 29 hours. Each mold starts with a gel coat. Molds are then given up to 100 layers of fiberglass and balsa. The fiberglass comes off large rolls, is cut by Eastmen (named for the machine cutting the fiberglass), and transported to the molds by electric fork trucks. Two mold shells are

[3] McMahon was subpoenaed to testify but was unable to appear. Respondent provided an excuse from a health care professional. (R Exhs. 31 and 32).

combined to make one blade. The structural integrity of each blade is enforced with a large piece of fabric, known as the shear web. "Trailing edge UD" also adds to the structural integrity at the edge of the blade. The final component is the "spar cap" area. The spar cap covers the entire length of each shell and adds strength to hold the shear web in place. Each mold goes through a bagging process to remove air out of the shell, then resin is infused into the fiberglass by vacuum. The resin is pumped in from a barrel and the resin machine does not move while resin is infused. The mold itself is then heated.

When the resin and glass are hardened from the heat and cooled, the mold is "debagged" and shear web is applied with one of the seven sets of cranes located in the facility. The shear web weighs approximately 1 ton. To make a blade, one of the molds, which has a hinge is flipped onto another mold shell. The blade is then lifted by crane and moved to the finishing department booth. Finishing cuts off the excess plastic off the blades. The blade is moved for lay-up and inspection. Lay-up adds more layers of fiberglass, which takes approximately five hours. The blades are moved by crane to the cure ovens, where they are baked for four hours. By this time, the blade weighs approximately 14,000 pounds. Although it never happened in this facility, a falling blade from a crane could result in serious injury or death, and structural damage to the facility.

Respondent's witnesses discussed how they maintained a strong emphasis on safety. During orientation, employees are encouraged to complete cards to report unsafe conditions. Respondent offers a safety incentive program for employees and supervisors. Boyd maintained any supervisor who discouraged safety improvement would be severely disciplined and possibly terminated. Boyd testified that no one was terminated for a first safety violation.

C. Organization Efforts and Respondent's Response

Respondent's Handbook includes a section entitled "Union Free Environment," followed with the bolded subheading: At TPI, Unions are Unnecessary. (GC Exh. 3, p.8).

In 2013, the International Brotherhood of Electrical Workers (the Union) filed a petition to organize the facility. The Union lost the election. In about May 2015, a group of employees again began organizing. Organizing meetings were held on Tuesdays and Thursdays. Among the leaders of the group was Vollers II. Vollers II owns hats, buttons/pins, and t-shirts that he wore on a regular basis and distributed to other employees who requested them.

Boyd denied knowledge of the unionization efforts until after July 1. However, Operations Manager Finchum stated Respondent distributed literature about unionization to employees from approximately June to August and knew in mid-June or July that alleged discriminatee Young was a union supporter. Supervisor Dave Lynch also heard employees discussing unionization as early as June. Production Manager Beck testified that he heard union chatter around early May.

On July 8, HR Generalist McMahon emailed to Van Huysen, Boyd and Finchum a list of union activities reported in the facility. The earliest on the list is dated June 29, in which mold employees talked about filing a petition in July. (GC Exh. 25).

Respondent hired Chessboard Consulting to assist with its anti-unionization campaign. Chessboard emailed Respondent on July 19 with preliminary drafts of literature and briefly discussed training the supervisors. (GC. Exh. 25). It also prepared to "train" employees about unionization. (GC Exh. 26). On July 21, via email, McMahon identified increased chatter about the Union.

On Wednesday, August 12, Boyd emailed the HR management team and supervisors about solicitation and distribution. Boyd reported reports of activity, either during time in work area, "or significantly before or after their assigned shifts." In addition to giving tips on enforcing solicitation and distribution, Boyd stated that employees could not be in the facility earlier than their scheduled shift per Respondent's handbook rules, and certainly not 1 ½ hours before shift. He encouraged them to particularly monitor break rooms for early and late employees. Boyd further instructed that any solicitation and distribution must be immediately handled through progressive discipline. (GC Exh. 35). During the organizing campaign, Respondent maintained it did not seek information from employees about their views on unionization, yet employees spoke with their supervisors about their viewpoints. When literature was distributed, some supervisors reported to Human Resources how employees responded. (Tr. 589-590; See GC Exh. 31, 34).[4]

In August or September 2015, HR Representative Wildman and Trainer Larry Crady conducted a meeting for employees. Wildman and Crady presented a video that Vollers II characterized as anti-union and afterwards discussed why they thought employees did not need a union. Crady particularly discussed his experiences working at Maytag. Supervisor David Lynch called meetings in the break room and distributed flyers to employees. Other supervisors distributed flyers to employees while they were working on the plant floor.

In mid-August, Chessboard Consulting selected Miriam Navarro to speak to the employees. (GC Exh. 37). She held meetings in the week of August 31 in the two-story, glassed-in office better known to employees as "the Fishbowl."[5] Navarro said it was an informal meeting, showed a video and allegedly answered questions.

The Union did not file a petition for an election. Respondent's witnesses testified that they believed that the organizing effort ended about Labor Day as nothing in the plant showed otherwise. Two employees spoke out at different meetings conducted by Navarro: Dennis Young and Charging Party Vollers II. As will be seen later, Young received a counseling for his actions; Vollers II did not.

HR Manager Boyd testified that no active campaigning took place since the fall of 2015. However, Young testified that employees still had weekly meeting and solicited cards into November, but did not circulate flyers after Labor Day.

[4] Supervisor Luke Coady rated employees' responses as 1 to 5, with 5 strongly pro-company. (GC Exh. 34).

[5] The Fishbowl earned its name because everyone can see into the office, including when someone is disciplined.

D. Framework for the Remainder of the Statement of Facts

The remainder of the decision deals specifically with the facts applicable to each allegation. General Counsel alleged that a number of rules as overly broad and were enforced. I first examine the rules for which I find no facts showing applications of the rules. I then discuss the rules that I find certain facts might be applicable. The initial review of these rules is only for whether the rules are overly broad. I discuss whether the rule was discriminatorily applied when I discuss the facts by employees to whom the rules were applied as well as applicable Section 8(a)(3) violations.

III. RULES IN THE HANDBOOK: APPLICABLE LAW

Complaint paragraph 6 alleges Respondent maintained and enforced eight unlawful rules. The record contains no evidence that the confidentiality, social media, and contact with media rules were enforced and I recommend dismissal of that portion of the allegations.

Section 7 provides employees with the right to self-organization and collectively bargaining, as well as the right to act together for their mutual aid or protection. These rights have long been interpreted to "necessarily encompass[ ] the right effectively to communicate with one another regarding self-organization at the jobsite." *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 491 (1978). These rights includes employee communications regarding their terms and conditions of employment. *Central Hardware Co. v. NLRB,* 407 U.S. 539, 542-543 (1972); *Parexel International, LLC,* 356 NLRB 516, 518 (2011), citing *Aroostook County Regional Ophthalmology Center,* 317 NLRB 218, 220 (1995), enfd. in part 81 F.3d 209 (D.C. Cir. 1996) (discussions regarding wages, the core of Section 7 rights, are the grist on which concerted activity feeds).

An employer violates Section 8(a)(1) of the Act if it maintains workplace rules that would reasonably tend to chill employees in the exercise of their Section 7 rights. See *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). The analytical framework for assessing whether maintenance of rules violates the Act is set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Under *Lutheran Heritage*, a work rule is unlawful if "the rule *explicitly* restricts activities protected by Section 7." Id. at 646 (emphasis in original). If the work rule does not explicitly restrict protected activities, it nonetheless will violate Section 8(a)(1) if "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." Id. at 647.

Rules cannot be construed in isolation and must be given a reasonable reading. *The Roomstores of Phoenix, LLC*, 357 NLRB 1690 fn. 3 (2011); *Lutheran Heritage,* 343 NLRB at 646. Any ambiguity in the rule must be construed against the drafter as employees should not have to decide what information is not lawfully subject to prohibition. *Hyundai America Shipping Agency*, 357 NLRB 860, 861-862 (2011); *Lafayette Park*, 343 NLRB at 825. Facial challenges to the rules do not depend upon evidence of enforcement. *Schwan's Home Service*, 364 NLRB No. 20, slip op. at 2, fn. 4 (2016). All rules are examined to determine whether an employee could reasonably construe the language to prohibit Section 7 activities. *Lily Transportation Corp.*, 362 NLRB No. 54 (2015).

Respondent generally argues that the handbook language is facially neutral, does not interfere with Section 7 rights, and was neither adopted in response to protected activity nor was it applied to protected activity.[6] Respondent also argues it was willing to change the rules. However, Respondent presented no evidence that the rules were changed. I therefore conclude that Respondent continues to maintain the rules.

IV. ALLEGED OVERLY BROAD RULES WITHOUT EVIDENCE OF ENFORCEMENT

A. The Property Policy and Use of Computers (Complaint ¶6(b))

The complaint alleges Respondent maintained and enforced a property rule that prohibits employees from using Respondent's computers to communicate with each other. (Complaint ¶6(b)). Respondent's policy states:

> All TPI property, equipment, data and systems (i.e., computers, phones, copy machines, fax machines, etc.) are owed by TPI and are not intended for performance of personal projects or for persona associate use. TPI has the right to access, review and administer all email, as well as what is stored in the personal computer, on the personal computer media and on the voice mail system. . . . Associates found using property, equipment, data or systems for personal use or for inappropriate or harassing messages, will be subject to disciplinary procedures, up to and including termination.

Employees who have "rightful" access to their employer's email system for work purposes also have the right to use that system for Section 7 communications during nonworking time. *Purple Communications*, 361 NLRB No. 126, slip op. at 1, 14 (2014). This rule applies when employees have been granted access to the employer's email system in the course of their work and the employer is not required to provide this access. Id., slip op. at 1. To rebut the presumption that employees have a right to access the employer's email system during nonworking time, an employer justifies restricting these rights by demonstrating that special circumstances are necessary to maintain production or discipline. The employer's restrictions should be based upon the nature of its business. The restrictions also should be narrowly tailored to meet the employer's special circumstances and still balance with employees' Section 7 rights. Further, the restriction must be uniform and consistently enforced. *Purple Communications*, supra. The mere assertion of a theoretical interest to support restrictions are not sufficient and:

> [A]n employer's interests will establish special circumstances only to the extent that those interests are not similarly affected by employee email use that the employer has authorized.

[6] Respondent also argues that the charges about the rules were improperly solicited by General Counsel. Respondent cites no authority for considering this claim during litigation of the actual unfair labor practices. At hearing, I sustained General Counsel's motion to preclude evidence regarding the claimed solicitation of charges.

Id., slip op. at 14.

The first step in *Purple Communications* requires demonstrating that the employees normally use the email system for work purposes. General Counsel argues that the policy anticipates employees utilizing email and that one discipline shows an hourly employee had access. The discipline states: "If you're assigned a task and unable to complete it, an email should have been sent out stating the issue." (GC Exh. 64, dated July 21).

Incidental access to email cannot be construed as normally using email for work purposes. This discipline is scant evidence to show that employees normally use email and does not state that the employee should have sent the email. None of the testifying employees mentioned email as part of their normal work duties. As a result, I find General Counsel did not carry its burden of proof and recommend dismissal of this allegation.

B. Confidentiality Policy (Complaint ¶6(f))

The complaint alleges that Respondent maintains and enforces a confidentiality policy that employees may not disclose "all non-public information" that might be harmful to Respondent or that has not been disclosed in press released or on Respondent's website, thus including all Respondent policies regarding employee terms and conditions of employment. This rule is overly broad.

An employer may legitimately require confidentiality rules in appropriate circumstances. However, the employer must attempt to minimize the impact of such a rule upon protected activity. *Boeing Co.*, 362 NLRB No. 195, slip op. at 1 (2015). When the rule fails to present "accompanying language that would tend to restrict its application," employees reasonably could assume that protected concerted activities, such as discussing wages, hours and terms and conditions of employment, are included in the prohibition. *Lily Transportation Corp.*, 362 NLRB No. 54, slip op. at 1 and fn. 3.

Respondent's policy here states:

> Confidential information generated and gathered in TPI's business plays a vital role in TPI's business, prospects and ability to compete. "Confidential information" includes all non-public information that might be of use to the competitors or harmful to the Company or its customers if disclosed. For the purpose of this Code, TPI Personnel should also assume that TPI's Confidential Information includes ANY information about the Company that it has not disclosed publicly in the form of news releases or on its website. TPI personnel may not disclose or distribute TPI's Confidential Information, except when such disclosure is authorized by TPI or is required by applicable law, rule or regulation or pursuant to an applicable legal proceeding. TPI personnel shall use Confidential Information solely for legitimate Company purposes. . . . When in doubt as to whether certain information is confidential, please treat it as confidential.

(GC Exh. 3, p. 7).

Respondent argues, without citing case law, that the term "confidential" meant that an employee would know TPI management and HR would not disclose information to anyone. It also contends that General Counsel, like the Tazmanian Devil,[7] is in a "tizzy" every time the term confidentiality is mentioned because the "C word" (confidentiality) is now a per se violation. The policy does not reflect the meaning that Respondent claims.

This policy defines and applies the term "confidential information" broadly. Respondent expects employees to keep everything it has not disclosed publicly confidential due to possible use by competitors. This information could include wages, hours and terms and conditions of employment as anything held in doubt should be treated confidentially. When Respondent includes anything that Respondent has not released in news releases or on its websites, this information easily covers wages, hours and terms and conditions of employment.

The rule does not convey Respondent's claimed meaning, nor does it minimize its effects. The maintenance of such a rule could easily be construed to prohibit discussions of wages and other terms and conditions of employment. *Long Island Association for AIDS Care, Inc.*, 364 NLRB No. 28, slip op. at 6-7 (2016); *Security Walls*, *LLC*, 356 NLRB 596, 610-612 (2011); *Longs Drug Stores California, Inc.*, 347 NLRB 500 (2006) (general confidentiality provisions unlawful). Unlike some of its other rules, it does not make the application to trade secrets. Even if some of the information requires protection, the rule "does nothing to legitimate the blunderbuss sweep of its existing rule." *Quicken Loans, Inc. v. NLRB*, ___ F.3d ___, slip op. at 11 (D.C. Cir. July 29, 2016).

The rule requires prior approval from Respondent to disclose information or only to disclose in legal proceedings. This requirement also restricts communicating with outsiders, such as a union, about wages, hours and terms and conditions of employment. This requirement also is overly broad: Employees cannot be required to obtain permission from the employer to engage in protected concerted activities on their free time and in non-work areas. *Schwan's Home Service*, 364 NLRB No. 20, slip op. at 4 (2016), citing *Brunswick Corp.*, 282 NLRB 794, 795 (1987). Also see *G4S Secure Solutions Inc.*, 364 NLRB No. 92, slip op. at 4-5 (2016).

Respondent also contends that no employee altered their exercise of their rights or understood it to be a violation. However, rules are not interpreted subjectively, but objectively. Because the mere maintenance of such a rule would likely have a chilling effect, the Board is not required to wait until a chilling effect is manifest. *Schwan's*, supra, slip op. at 10; *Quicken Loans, Inc. v. NLRB*, supra.

C. The Media Relations Policy (Complaint ¶6(e))

The media relations policy states:

[7] The Tazmanian Devil, or Taz, is a cartoon character originally developed by Warner Bros. Cartoons.

> While our facility has received a great deal of positive media attention, it is important to reiterate that you are required to refer all media requests to the General Manager or to the Human Resources Manager.

Rules that prohibit employees from talking about wages, hours and terms and conditions of employment to third parties are unlawful. *Victory Casino Cruises II*, 363 NLRB No. 167 (2016). Also see *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1987). The rule here is so broad that an employee reasonably would not know if the rule was limited to proprietary information or protected subjects, such as wages, hours and terms and conditions of employment. The media relations policy is overly broad and therefore violates Section 8(a)(1) of the Act.

D. The Social Media Guidelines (Complaint ¶6(f))

A full copy of the Social Media Guidelines is available in "Appendix A." The Complaint alleges that the social media policy has several unlawful aspects: prohibiting employees from posting or discussing internal policies or procedures of Respondent including policies affecting working conditions; requiring that a posting does not adversely affect Respondent or its employees; requiring employees to be "honest and accurate," "respectful" and "fair and courteous"; and requiring posting to be labeled as a personal opinion and not representative of the views of fellow associates. I also consider whether the "savings clause" at the end of the policy corrects any found violations.

Social media may be used as a method to communicate about Union and/or protected concerted activities. See: *Pier Sixty, LLC*, 362 NLRB No. 59 (2015); *Bettie Page Clothing*, 361 NLRB No. 79 (2014); *Triple Play Sports Bar and Grille*, 361 NLRB No. 31 (2014). Social media, by Respondent's definition, includes internet posting, blogging and a variety of other electronic connections. This rule was not promulgated in response to union activity or to Section 7 activity. As a result, the inquiry is whether the guidelines reasonably would be interpreted as prohibiting Section 7 activity. *Lutheran Heritage*, 343 NLRB at 657.

1. Posting cannot adversely affect Respondent or employees

Under the general topic of "Guidelines," the policy states:

> . . . Ultimately, you are solely responsible for what you post online. Before creating online content, consider some of the risks and rewards that are involved. Keep in mind that any of your conduct that adversely affects your job performance, the performance of fellow associates or otherwise adversely affects members, customers, suppliers, people who work on behalf of TPI or TPI's legitimate business interests may result in disciplinary action up to and including termination.

This provision effectively prohibits employees from "negative" discussions. An employee reasonably would conclude that this provision would limit protected activities such as discussions on wages, hours or other terms and conditions of employment. *The Roomstores of Phoenix, LLC*, 347 NLRB 1690, 1691 fn. 3 (2011). Also see: *Grill Concepts Services*, 364 NLRB No. 36, slip op. at 23-24 (2016); *William Beaumont Hospital*, 363 NLRB No. 162, slip

op. at 2 (2016) (restrictions on negative or disparaging comments would reasonably be construed to limit activities protected by Section 7). Employees reasonably would infer that a labor organization or protected activities, such as wages discussions, are working against Respondent's "legitimate business interests" and could receive discipline for such posting. In that respect, the policy also would chill Section 7 activity. This portion of the policy therefore violates Section 8(a)(1). *T-Mobile*, 363 NLRB No. 171, slip op. at 3 (2016) (employees would reasonably understand work rule regarding maintaining positivity as prohibiting negative conversations because detrimental to employer); *Quicken Loans v. NLRB*, supra.

2. Employees prohibited from posting/discussing internal policies or procedures

The rule provision at issue here, the first bulleted point under the heading of "Post only appropriate and respectful content," states:

> Maintain the confidentiality of TPI trade secrets and private or confidential information. Trade secrets may include information regarding the development of systems, processes, products, know-how and technology. Do not post internal reports, policies, procedures or other internal business-related confidential information.

When the rule is not clear as to what information is restricted, the rule is construed against the drafter. *Schwan's Home Service*, 364 NLRB No. 20, slip op. at 3 (2016). The guidelines prohibit disclosing trade secrets, which is lawful. Respondent even provides a description of what constitutes trade secrets. *Minteq International Inc.*, 364 NLRB No. 63, slip op. at 6 (2016).

However, the remainder of the rule separately identifies reports, policies, procedures or other internal business-related confidential information. Unlike trade secrets, this portion of the rule is not defined. "[E]mployees should not have to decide at their peril what activities a rule prohibits." *Schwan's Home Service*, supra, slip op. at 3 (cites omitted). For this portion of the rule, employees would reasonably interpret this restriction as limiting communications about wages and terms and conditions of employment between employees and limiting appeals to third parties about Section 7 issues. *Rio All-Suites Hotel*, 362 NLRB No. 190, slip op. at 3 (2015); *Quicken Loans, Inc*., 359 NLRB No. 171 (2014) affd. as modified 361 NLRB No. 63, slip op. at 1 fn. 1 (2014). This interpretation is differentiated from *Minteq*, supra. The *Minteq* definition of confidential information was first defined as information not generally known in the relevant trade or industry. The second sentence then provided examples, with the concluding phrase as "any other information which is identified as confidential by the Company." The Board, reading the phrases in conjunction, found the second sentence defined the first sentence. Here, the second sentence extends to policies: A reasonable employee could find policies limit sharing information about employment policies, which is unlawful. As discussed regarding the Confidentiality policy, this restriction on confidentiality is unlawful.

3. Employees must be "honest and accurate," "respectful", "fair and courteous"

The subsection, entitled "Be respectful," instructs employees with:

> Always be fair and courteous to fellow associates, customers, members, suppliers or people who work on behalf of TPI. Also, keep in mind that you are more likely to resolve work-related complaints by speaking directly with your coworkers or Human Resources than posting complaints to a social media outlet. Nevertheless, if you decide to post complaints or criticism, avoid using statements, photographs, video or audio that reasonably could be viewed as malicious, obscene or threatening or intimidating that disparage customers, members, associates or suppliers, or that might constitute harassment or bullying. Examples of such conduct might include offensive posts meant to intentionally harm someone's reputation or posts that could contribute to a hostile work environment on the basis of race, sex, disability, religion or any other status protected by law or company policy.

The policy also includes a section entitled "Be honest and accurate":

> Make sure you are always honest and accurate when posting information or news, and if you make a mistake, correct it quickly. Be open about any previous posts you have altered. Remember that the Internet archives almost everything; therefore, even deleted postings can be searched. Never post any information or rumors that you know to be false about TPI, fellow associates, members, customers, suppliers, people working on behalf of TPI, or competitors.

The first sentence requirement in the first paragraph to be "fair and courteous" is sufficiently ambiguous for an employee's reasonable reading and therefore is overly broad. *First Transit*, *Inc.*, 360 NLRB No. 72, slip op. at 3 (2014) (rule prohibiting "discourteous or inappropriate behavior" unlawful).

In reading the non-disparagement portion in context with the following sentence describing what types of conduct is offensive, it relates more towards harassment and bullying and has little to do with disparagement. To the extent that the rule requires non-disparagement, it is unlawful. *Chipotle Services LLC d/b/a Chipotle Mexican Grill*, 364 NLRB No. 72, slip op. at 1 fn. 3 and slip op. at 9 (2016).

The rule also prohibits posting information or rumors that are known to be false. However, to lose the protection of the Act, the employee must post with a malicious motive, with knowledge of the falsity or reckless disregard for their truth or falsity. Id., slip op. at 9. Because this portion of the rule in "honest and accurate" includes a component of knowledge in the falsity of the posting, it is not unlawful. Id.

4. Requiring employees to identify not speaking for Respondent

The provision at issue, the third bulleted point under "Post only appropriate and respectful content," states:

> Express only your personal opinions. Never represent yourself as a spokesperson for TPI. If TPI is a subject of the content you are creating, be clear and open about the fact that you are an associate and make it clear that your views do not

> represent those of TPI, fellow associates, members, customers, suppliers or people working on behalf of TPI. If you do publish a blog or post online related to the work you do or subjects associated with TPI, make it clear that you are not speaking on behalf of TPI. It is best to include a disclaimer such as "The postings on this site are my own and do not necessarily reflect the views of TPI."

General Counsel, citing *Quicken Loans*, argues that he first sentence prohibits Section 7 activity as an employee would reasonably believe that he was prohibited from posting a concerted complaint about working conditions on social media. The title to this section also acts as a directive. I agree that the rule is unlawful.

The rule effectively requires employees, while on line, to disassociate themselves from their employer, which is also overly broad. *Schwan's Home Service,* 364 NLRB No. 20, slip op. at 4 and 16-17.

5. "Savings clause" at the end of the policy

In a separate section at the end of the policy, under a non-bolded heading, the policy contains the following disclaimer about its limitations due to the Act:

> NLRB Statement
> These Social Media Guidelines are intended to maintain TPI's reputation and legal standing, and are not intended to prohibit associates from exercising their right to engage in protected concerted activity under the National Labor Relations Act.

(GC Exh. 3).

The Board has long held that these types of disclaimers do not advise employees when a rule is overly broad and what rights employees have pursuant to Section 7. As one judge stated, such a provision is designed to protect the respondent but not employees. *Ingram Book Co.*, 315 NLRB 515, 516 (1994). *McDonnell Douglas Corp*., 240 NLRB 794, 802 (1979); *Allied Mechanical*, 349 NLRB 1077, 1084 (2007). This "savings clause" does not save Respondent from liability from the overly broad rules contained in the social media guidelines. *Chipotle Services*, 364 NLRB No. 72, slip op. at 9.

E. <u>The Outside Employment and/or Vendor Relationships Policy (Complaint ¶6(h))</u>

General Counsel alleges that Respondent maintains an employment practices policy that in effect requires employees to disclose their activity on behalf of the Union or any other labor organization. Although I find a violation, General Counsel neglected to allege whether the rule also affected other protected concerted activities. I find that the rule is overly broad in not only the alleged union activity, but other protected concerted activities as well.

The handbook section identified as Outside Employment and/or Vendor Relationships" states:

> …This policy also applies to associates engaged in vocational, educational or other outside activities that may interfere with and affect job performance. It is the associate's responsibility to disclose to Human Resources if they are engaged with outside employment and or other interests.

As General Counsel correctly points out, the policy does not define "other outside activities" or "other interests." The policy also has a reporting requirement for outside employment.

Section 1 of the Act protects the full freedom of association, including self-organization. An employee reasonably would understand that this provision would prohibit association with not only a labor organization, but working with a labor organization as a salt, pepper or union official. See *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 87 (1995);[8] *Casino Ready Mix v. NLRB*, 321 F.3d 588 (D.C. Cir. 2003). These requirements conflict with the Act and are overly broad.

In addition, the provision requires disclosure of other interests, which could be interpreted as requiring disclosure of union or other protected concerted activities, such as concertedly pursuing relief under other laws. By prohibiting such activities and requiring disclosure, the policy flies in the face of both Section 1 and 7 of the Act. See generally *Schwan's Home Services*, 364 NLRB No. 20, slip op. at 6-7 (rule requiring disclosure of other interests infringed upon Section 7 rights). Also see *Minteq*, 364 NLRB No. 63, slip op. at 7 (rule places restrictions on employees' ability to communicate with customers and efforts to engage in Section 7 activities). This rule is therefore overly broad with regard to union and other protected concerted activities. *Lutheran Heritage*, supra.

V. HANDBOOK RULES THAT ALLEGEDLY WERE ENFORCED

A. Solicitation Policy

The Complaint alleges the solicitation policy prohibits employees from discussing with one another "non work related ideas" or making pleas or requests of one another. (Complaint ¶6(a)). Boyd, in response to a series of leading questions, denied any selective enforcement towards union activity of the solicitation policy. (Tr. 730). The facts of this case reflect otherwise and I discredit these answers.

1. *Respondent's Policy*

Respondent has a lengthy Solicitation Policy. (GC Exh. 3, p. 5). Initially the policy states that solicitation is not allowed during working time so that work will not be interrupted and that

[8] Justice Breyer discussed how an employee who may be otherwise employed yet be able to perform the ordinary work tasks while in the employer's control and having divergent interests at times would be irrelevant. *Town & Country*, 516 U.S. at 94.

solicitation is only permitted on non-working time. Respondent defines working time by what it is not: "break time, meal periods, time immediately preceding or following a work shift, or periods when associates are not engaged in performing assigned tasks." Regarding the limitations on access to the facility, the Workplace Rules section, in relevant part, states:

> 7. You should only be on plant property during your work shift.

(GC Exh. 3, p. 8).

The solicitation policy then defines what solicitation is:

> Includes approaching a person with a request or a plea, or asking a person to sign any non-work related document or support any non-work related ideas. Solicitation and/or distribution of literature:
>
> - Must not interfere with the work of an associate.
> - Must not involve threats, coercion or intimidation.
> - Must not litter the premises or cause a disturbance.
> - Must not be conducted during working time or in working areas.

The policy prohibits certain types of solicitation at all times on the premises. These include "taking orders, selling or delivering goods such as candy, cosmetics, greeting cards . . . ." The policy nonetheless permits solicitation for flower funds and baby gifts during non-working time. Respondent also permits certain charitable drives that it sanctions. Lastly, the policy requires an associate tell other associates who might be in violation of the policy what the policy states and to report any other associate who is perceived to be violating the policy to Human Resources.

2. *Respondent maintained overly broad policy for solicitation and distribution*

The rule implicates both solicitation and distribution, which are not the same in the legal sense. Traditionally "solicitation and distribution of literature or *different* organizational techniques and their implementation pose[d] *different* problems both for the employer and for employees." *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, 619 (1962) (*emphasis in original*). Solicitation is viewed as an oral request; distribution is considered handing out literature. Id. at 617-618. I therefore cover them separately.

The solicitation rule is overly broad in several areas. The first area is the definition of solicitation itself, which is overly broad. The definition of solicitation is ". . . approaching a person with a request or a plea, or asking a person to sign any non-work related document or support any non-work related ideas." This definition is close to the one found unlawful in *Jupiter Medical Center Pavilion*, 346 NLRB 650, 658 (2006). That employer defined solicitation as including "any act of urging or persuading individuals." By prohibiting any act of urging or persuading, an employee would be discouraged from participating in Section 7 activity. Id. Talking, by itself, is not solicitation within the context of a no-solicitation rule. *Pacific Coast M.S. Industries Co., Ltd.*, 355 NLRB 1422, 1438 (2010), citing *Wal-Mart Stores*, 340 NLRB 637, 638-639 (2003) (Bautista dissenting). Similarly here, an employee would reasonably

perceive a limitation from asking a fellow employee to attend a meeting about wages, hours and terms and conditions of employment, or discussing such matters.

An employee may solicit for Section 7 concerns outside of working hours. *Cooper Tire & Rubber Co. v. NLRB*, 957 F.2d 1245, 1249, reh'g denied 968 F.2d 18 (5th Cir. 1992), cert. denied 506 U.S. 985 (1992). Rules prohibiting solicitation during working time are presumptively lawful because ". . . that term denotes periods when employees are performing actual job duties, periods which do not include the employee's own time such as lunch and break periods." *Our Way*, 268 NLRB 394, 394–395 (1983). However, a solicitation rule is presumptively invalid when solicitation is prohibited during the employee's own time and does not interfere with production. *Our Way*, 268 NLRB at 394. An employer may ban solicitation in working areas during working time; however, the ban cannot be extended to working areas during nonworking time. *UPS Supply Chain Solutions, Inc*., 357 NLRB 1295, 1296 (2011).

Respondent's no-solicitation rule prohibits solicitation in the working areas of the company, without regard to whether employees are taking breaks in the area. Because the rule does not extend to nonworking time in work areas, the solicitation rule is overly broad and violates Section 8(a)(1). *UPS Supply Chain*, supra; *Our Way*, 268 NLRB at 394.

The rule, and the Workplace Rule limiting access, are also unlawful by limiting employees to solicitation "immediately" before a shift or afterward, and for the rule, only during the shift. An employer's rule barring off-duty employees from access to its facility is valid only if it: (1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity. *Grill Concept Services,* 364 NLRB No. 36, slip op. at 22, citing *Tri-County Medical Center*, 222 NLRB 1089, 1089 (1976). See also *Saint John's Health Center*, 357 NLRB 2078, 2080-2081 (2011); *TeleTech Holdings, Inc.*, 333 NLRB 402, 404 (2001); *Nashville Plastic Products*, 313 NLRB 462, 463 (1993); *Fairfax Hospital*, 310 NLRB 299, 308-309 (1993), enfd. mem. 14 F.3d 594 (4th Cir. 1993), cert. denied 512 U.S 1205 (1994). In *Saint John's*, 357 NLRB at 2081, the Board explained through a historical review that the plant is an appropriate place for employees to share common interest and where they traditionally seek to persuade fellow workers in matters affecting their status as employees.

I find that the limited access rules are not valid because they violate the first prong of the *Tri-County* test. Employee access was not limited to working areas, but the entire facility. It carves out no exception for break areas or parking lots. The rule therefore is overly broad. In later segments, regarding employee Cindy Mikkelson, the rule was applied discriminatorily, which violates the third prong of *Tri-County.*

Regarding distribution, a rule that prohibits distribution of literature on employees' own time and in nonworking areas is presumptively invalid. *UPS Supply Chain*, supra, citing *TeleTech Holdings, Inc.*, 333 NLRB 402, 403 (2001). A rule that prohibits distribution of literature in all working areas and all areas of the plant property violates Section 8(a)(1). Respondent's rule does not differentiate whether employees could be on their own time in a working area and distribute literature. As a result, the rule is overly broad.

The rule also requires that employees report alleged violations. When a rule infringes upon Section 7 activity, a requirement to report violations also violates the Act. See generally *UPMC*, 362 NLRB No. 191, slip op. at 5.

3. *Evidence regarding enforcement of no-solicitation policy*

A number of employees saw different solicitations, but did not know whether supervisors witnessed any of the incidents. The sales included Girl Scout Cookies, eggs, pizzas for scouts, burritos, fruit for the Future Farmers of America, and cookie dough. Supervisor Dave Lynch knew that people sold cookies by filling out papers in the office, but never saw deliveries. Production Manager Beck, about two years prior, saw someone selling Girl Scout Cookies with a pamphlet and told the person not to solicit on the floor: He said he considered the discussion a verbal counseling.

On November 13, 2014, Maintenance Manager McGlothlin caught Josh Peterson selling potato chips. Peterson "went back to his vehicle several times during the shift" 11 times and McGlothlin gave him a written warning on November 15, 2014 for leaving the work area and counseling him about solicitation. However, the written warning states it is only for leaving the work area and nothing about counseling for solicitation. (R. Exh. 21; Tr. 1081-1083). HR Manager Boyd testified, without documentary support, that a few supervisors sold cookies, sandwiches or pizza. He told them could not sell such items because it was not consistent with the solicitation policy. Respondent presented no evidence that the supervisors who were caught received any counseling or other forms of discipline.

B. Recording Devices Policy (Complaint ¶6(c))

The Complaint alleges two policies regarding recording devices policy unlawfully prohibit employees for audio or visual recording. The first policy, on recording devices, prohibits use in the plant and on company property. Recording devices are defined as "cell phones, camera phones, iPads, etc." It applies to employees, contractors, visitors, vendors and customers. The policy explains that associates who violate the policy will be subject to discipline, up to and including termination, and possible prosecution under applicable law. The policy explains its rationale:

> The use of these devise for recording purposes is absolutely prohibited as a matter of workplace safety, for protection of privacy, for avoidance of workplace harassment, mischief, and for protection of company trade secrets and confidential information. . . . The purpose of this policy is fourfold: (1) ensure unsafe acts are not committed by using recording devices or sending text messages that may cause an individual to put themselves or others in harm's way by being preoccupied with electronic recording devices; (2) all associates should have protection of privacy in their conversations during day to day interactions; (3) removal of recording activity helps eliminate acts of intimidation and harassment that can create a hostile work environment; and to (4) protect the intellectual property of TPI's (a) practices (b) documents (c) trade secrets (d) customer information and other related information that is the sole property of the company.

The policy has two additional paragraphs, one to explain how recording could be an act of intimidation and another about protection of intellectual property, and then reiterates the purposes with the statement of enforcement.

The second policy is contained in the Workplace Rules section, which states, in relevant part:

> 2. Cellular phones are not allowed on the plant floor unless it is part of an associate's job. They may be used in the break room or outside only during scheduled breaks.

Boyd testified that these policies are in effect because of safety and its contract with General Electric, which requires protecting the proprietary information. As a result, any photography by anyone in the plant is strictly prohibited. (Tr. 701-703).

A rule that broadly prohibits recording in the workplace on employees' own time and in non-work areas unlawfully restricts Section 7 activity, which violates Section 8(a)(1) of the Act. *T-Mobile USA, Inc.*, 363 NLRB No. 171, slip op. at 4-5 (2016); *Rio All-Suites Hotel & Casino*, 362 NLRB No. 190, slip op. at 4 (2015); *Whole Foods Market*, 363 NLRB No. 87, slip op. at 3 (2015). Respondent has an interest in maintaining the confidentiality of the manufacturing processes, but the policies are too broadly drawn to protect only those interests. The first policy does not give any rights to use the devices in break rooms or on the parking lot because the policy says "company property." Respondent makes no argument that the rule permits protected activity, which might include protected picketing, documenting unsafe working conditions, documenting discussions about terms and conditions of employment or documenting inconsistent application of employer rules. *T-Mobile*, supra, citing *Whole Foods*, 363 NLRB No. 87, slip op. at 3.

The Workplace Rule, located in a different area of the handbook, also is overly broad because it limits usage to "scheduled breaks" and does not consider whether employees could use the phone during non-working time, such as before or after a shift. Because employees reasonably would not understand they could record under circumstances other than scheduled breaks, the rule chills employees who wish to exercise their Section 7 rights and therefore violates Section 8(a)(1) of the Act. *Whole Foods Market*, supra, citing *Rio All-Suites Hotel*, 362 NLRB No. 190, slip op. at 5.

VI. Tammy Farver

The complaint alleges that, on August 13 and August 24 respectively, Respondent violated Section 8(a)(3) of the Act when it verbally warned and issued a written warning to employee Farver. (Complaint ¶¶7(e) and (g)). The complaint also alleges that, in violation of Section 8(a)(1), on August 13, Supervisor Illingworth prohibited an employee from talking about the Union and on August 24, Respondent prohibited an employee from discussing with coworkers anything that occurred in the conversation between HR Generalist McMahon and the employee. (Complaint ¶¶5(g) and (i)).

A. Applicable Law

In examining the following events, as well as many of the employees to follow, the following principles apply:

> It is well established that employees are entitled to discuss unions and solicit for unions on nonworking time, unless the employer can show that it needs to limit the exercise of that right in order to maintain production or discipline.[11] *Republic Aviation Corp. v. NLRB,* 324 U.S. 793, 803 (1945), and *Peyton Packing Co.*, 49 NLRB 828, 843-844 (1943), enfd. 142 F.2d 1009 (5th Cir.), cert. denied 323 U.S. 730 (1944). It is also well settled that "an employer may forbid employees from talking about a union during periods when the employees are supposed to be actively working, if that prohibition also extends to other subjects not associated or connected with the employees' work tasks. However, an employer violates the Act when employees are forbidden to discuss unionization, but are free to discuss other subjects unrelated to work." *Jensen Enterprises*, 339 NLRB 877, 878 (2003).

Sam's Club, 349 NLRB 1007, 1009 (2007) (footnote cite omitted).

I also consider whether Respondent unlawfully applied its solicitation rule here. Discipline given pursuant to an overly broad rule is unlawful. *William Beaumont Hospital*, 363 NLRB No. 162, slip op. at 3, fn. 10 (2016), citing *Continental Group*, 357 NLRB 409, 410 (2011). "The discipline given pursuant to an unlawfully overbroad rule is unlawful only when the employee 'violated the rule by (1) engaging in protected conduct or (2) engaging in conduct that otherwise implicates the concerns underlying Section 7.'" *Flex Frac Logistics, LLC*, 360 NLRB No. 120, slip op. at 2 (2014), citing *Continental Group*, 357 NLRB at 412.

I also consider whether Respondent's actions violated Section 8(a)(3). Respondent presents a legitimate business defense for consideration. When based upon a dual motive analysis, I will apply the burden shifting process established in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The General Counsel must establish four elements by a preponderance of the evidence. First, General Counsel must show the existence of activity protected by the Act. Second, he must prove that Respondent was aware that the employees had engaged in such activity. Third, General Counsel must show that the alleged discriminatee(s) suffered an adverse employment action. Fourth, there must be a link, or nexus, between the employees' protected activity and the adverse employment action. Proving these four elements creates a presumption that the adverse employment action violated the Act. To rebut the presumption, Respondent bears the burden of showing that the same action would have taken place even in the absence of the protected conduct. *Wright Line*, 251 NLRB at 1089. See also *Manno Electric, Inc.*, 321 NLRB 278, 280 fn. 12 (1996).

B. Facts

Tammy Farver (Farver) began work for Respondent on August 25, 2008. She works in final finish, which involves touch-up sanding, painting and adding decals to blades. She also takes three blades to make them into a set. Her supervisor is Scott Illingworth and Jay Barnes is

her process coordinator. Her last appraisal, signed by Farver on September 8, reflects a numerical score in the proficient area. The appraisal stated that half the time she performs work on her own, is an asset to the team, and does most of the training of new members in final finish. (GC Exh. 6).

Farver was involved in the unionization efforts in 2013 and 2015. In 2013, she served as a union observer during the election. She became involved again in July 2015. In August, Illingworth handed out anti-union flyers about every two weeks. Farver did not always accept the flyers and if she did not, she responded, "No, thank you."

One late morning, Illingworth handed flyers to Farver and six other employees in the paint booth and walked away. The employees began to read the flyers. Illingworth returned and said, "No talking about the Union." Farver responded, "If you don't want us to talk about the Union, why would you hand these out." Illingworth walked away. (Tr. 480). Illingworth did not see Farver with any authorization cards. Illingworth further admitted that the employees could have walked away if they desired and they had nothing to paint at the time he confronted the group of employees. (Tr. 976). Thus, the employees had no work to perform while they were talking.

Respondent contends that Farver gathered employees to talk about the Union when Illingworth was not present. However, Illingworth testified he was approximately the length of a blade away and could see clearly what was going on in the paint booth. Illingworth testified he told the entire group that they were on work time and "We're not to be talking about this, that and everything, including the Union." (Tr. 965). Illingworth considered this statement a counseling.

The day after Illingworth counseled the group, two employees complained to Illingworth: Illingworth first testified that two said they were tired of Farver talking about the Union while they were working and said she interrupted their work. Illingworth later testified the employees said they were "bothered." Illingworth took the employees' word for what happened. He did not know whether Farver continued the discussion after he counseled the group and he did not bother to investigate further, including a failure to talk with Farver.

About 5 minutes after the employees spoke with him, Illingworth went to Beck's office and advised him about the complaints. Illingworth and Beck then met with HR Generalist McMahon to determine how to deal with the complaints. McMahon considered the earlier statement to the group of employees a counseling, so McMahon determined that a written warning was appropriate.

On August 24, Respondent issued to Farver a written warning, dated August 21, about her conduct on August 20. Farver received the written warning in McMahon's office, with McMahon, Illingworth, and Production Manager Beck present. Illingworth read the warning to Farver. The warning stated she violated the no solicitation policy by engaged several employees on the production floor during work time on August 20 and that the employees asked her to stop. The warning, signed by Illingworth, said that Farver previously was counseled on August 13 regarding solicitation while on the production floor. (GC Exh. 5). Illingworth said, "I am just warning you with this." Farver said, "This is really strange, because I haven't even had any

authorization cards signed." At some point during the conversation, McMahon told Farver she violated the solicitation policy and told her what was and was not allowed. McMahon then pushed the warning across the table and Farver said she would not sign it. McMahon said she did not have to sign it. Beck, McMahon, and Illingworth had a discussion of whether they were finished. McMahon said to Farver, "Whatever happened in this office today, do not share it with anybody on the floor." Farver asked if she should report other employees who talk about the Union on the floor. McMahon said, "Yes, please." (Tr. 485).[9]

After that meeting until the end of August, Farver began to ask employees to sign union cards. She denied that she ever solicited employees to sign authorization cards while on the work floor.

Boyd testified that McMahon disciplined Farver on August 24 because hourly employees reported solicitation on the floor. Boyd, in response to a leading question, answered affirmatively that her alleged solicitation affected production, but did not identify how it affected production. (Tr. 754-755). Boyd never testified about conducting an investigation to show production was affected. I find this testimony inconsistent with Illingworth, who was on the plant floor and said no work was taking place with the original incident, and did not investigate on the complaints of the employees.

Several employees testified that they talk to each other while working without any problems with production. Boyd denied that Respondent would stop employees from talking about the Union on the floor as other conversations are allowed, but solicitation would not be allowed. (Tr. 746-747). Operations Manager Finchum testified that talking on the floor was not restricted as long as production was not affected or another employee did not complaint about the conversation. (Tr. 840). He also denied that employees' conversations were monitored or that they were limited in what they could discuss. Id.

C. Analysis

Respondent violated Section 8(a)(1) and Section 8(a)(3) with the events described in the paint booth in several ways, then violated the Act again with further discipline and coercive statements.

An employer violates Section 8(a)(1) by prohibiting employees from speaking with each other about terms and conditions of employment, unless it can prove a specific legitimate and substantial business justification. *Central States Southeast and Southwest Areas*, 362 NLRB No. 155, slip op. at 2 (2015). A valid no discussion rule must apply to all topics, not just one topic. *Double Eagle Hotel & Casino*, 414 F.3d 1249, 1255-1256 (10th Cir. 2005). As Respondent witnesses admitted employees discuss other matters unrelated to work during work time as long as it did not interfere with production, these statements establish an unlawful no talking rule,

[9] Illingworth did not deny that McMahon made the last two statements. Illingworth initially was very stiff and rehearsed during direct examination. However, he was much more forthcoming with answers when I asked him questions about the lack of investigation into Farver's conduct and the alleged effects on production. Beck testified briefly about the meeting and much of his direct testimony also was to leading questions, including whether Farver asked whether she should report others.

directed at Union activity. See *Pier Sixty, LLC*, 362 NLRB No. 59, slip op. at 21-22 (2015), citing *Sam's Club,* 349 NLRB 1007, 1009 (2007); *Anderson-Rooney Operating Co.*, 134 NLRB 1480, 1491-1492 (1961).

Regarding Section 8(a)(1), Illingworth told employees that they could not be talking about anything, including the Union, despite having no work to perform. Respondent admitted that it permitted discussions without limitations on topic as long as production proceeded. I find that Illingworth promulgated an unlawful "no talking" rule, contrary to Boyd and Finchum's statements, and the promulgation was in response to Union activity. *Austal USA, LLC*, 349 NLRB 1007, 1009 (2007), enfd. 343 Fed. Appx. 448 (11th Cir. 2009). Also see *Anderson-Rooney Operating Co*., 134 NLRB 1480, 1491, 1492 (1961) (employer argued union talk more disruptive than other talk).

The statement to employees also was coercive. Under Section 7 of the Act, employees have the right to engage in concerted activities for their mutual aid or protection. Section 8(a)(1) of the Act makes it unlawful for an employer, via statements or conduct, to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. *G4S Secure Solutions (USA) Inc.*, 364 NLRB No. 92, slip op. at 2-3 (2016); *Yoshi's Japanese Restaurant & Jazz House*, 330 NLRB 1339, 1339 fn. 3 (2000). The test for evaluating whether an employer's conduct or statements violate Section 8(a)(1) of the Act is whether the statements or conduct have a reasonable tendency to interfere with, restrain, or coerce union or protected activities. Id.; *Park 'N Fly, Inc.*, 349 NLRB 132, 140 (2007). Telling employees that they can no longer talk about anything and specifying the Union, especially when no work is available, is coercive.

Respondent also unlawfully applied its new rule to an employee discussion of Respondent's flyer and gave Farver a "counseling," per *Continental Group*. Illingworth also unlawfully counseled the group for talking at a work station about Respondent's anti-union flyer. Illingworth admitted no work was taking place and yet told employees they needed to get to work and could not talk about anything, including the Union. Respondent issued the counseling based upon the unlawful no talking rule for Section 7 activity.

Even assuming Respondent had a "good faith" belief that Farver violated the rule, Respondent also violated Section 8(a)(1). The test for discipline here has three prongs: An employee is engaged in protected activity; the basis of the alleged act of misconduct occurred during the protected activity; and the employee was not, in fact, guilty of misconduct. *In re Shamrock Foods Co.*, 337 NLRB 915, 915 and 924-925 (2002), enfd. 346 F.3d 1130, rehg. denied (D.C. Cir. 2003), citing *Burnip & Sims,* 379 U.S. 21 (1964). As previously established, the discussion was protected: Illingworth perceived the discussion was about unionization and no work was needed. Farver was engaged in protected activity, but was not violating Respondent's rule that she could discuss anything when no work was needed.

Illingworth, as well as other supervisors throughout this case, stated employees were bothered by the union discussions. In particular with the reported statements to Illingworth, they were tired of Farver talking about the Union. However, employees have a statutory right to engage in Section 7 activity even when other employees are disturbed or bothered by it. See generally *Care One at Madison Avenue, LLC*, 361 NLRB No. 159, slip op. at __ (2014). Being

tired of hearing about unionization is not equivalent to interference with production and no evidence supports a conclusion that Farver's discussions affected production.

Respondent relied upon the first counseling to warrant stepping up discipline against Farver. Respondent's written warning to Farver also violated Section 8(a)(1). Respondent contended that counselings and coachings did not constitute verbal warnings and seemed to minimize their impact for future discipline. Throughout the facts of this case, those counselings and coachings were used in progressive discipline. General Counsel correctly points out that when "coachings are clearly part of the disciplinary system," when the coaching or counseling is considered as a basis for future discipline. *Promedica Health Systems, Inc.*, 343 NLRB 1351 (2004), enfd. in rel. part, 206 Fed.Appx. 405 (6th Cir. 2006), cert. denied 549 U.S. 1338 (2007). Because Respondent relied upon an unlawful discipline, the subsequent discipline also is faulty. *St. George Warehouse, Inc.*, 349 NLRB 870, 878 fn. 27 (2007).

Farver was engaged in union activities and was a known union supporter. The evidence does not demonstrate Farver was soliciting, but Respondent relied upon its evaluation to give the written warning. This cursory investigation did not discover whether Farver's conduct continued after the previous counseling. Thus, Respondent had no basis for determining that Farver engaged in misconduct. Even under a more stringent standard for solicitation, Respondent cannot demonstrate that anything Farver did constituted solicitation. *ConAgra Foods, Inc. v. NLRB*, 813 F.3d 1079 (8th Cir. 2016), denying enf. in relevant part, *ConAgra Foods, Inc*., 361 NLRB No. 113, slip op. at 2 (2014). Instead, Farver was talking about unionization and no evidence demonstrates that she solicited for cards at all. According to the test in *Burnip & Sims,* supra, Respondent erroneously gave Farver discipline for protected activity.

In *Shamrock*, 337 NLRB at 915, the Board found it unnecessary to make a determination that Respondent violated Section 8(a)(3) after determining Respondent violated Section 8(a)(1) per *Burnip & Sims.* However in *Santa Fe Tortilla Company*, 360 NLRB No. 130, slip op. at 3-4 (2014), the Board found that, although *Wright Line* was unnecessary, a *Wright Line* analysis yielded a Section 8(a)(3) violation as well. In applying the *Wright Line* analysis, I find Section 8(a)(3) violations for both the counseling and the written warning. Animus is shown through Illingworth's statement to employees directed towards "union" talk and lack of any investigation to determine whether a violation even took place. The failure to conduct a meaningful investigation or give Farver an opportunity to explain before Respondent issued discipline show discriminatory intent. *Ozburn-Hessey Logistics, LLC v. NLRB*, 609 Fed.Appx. 656, 658 (D.C. Cir. 2015), enfg. 357 NLRB 1632 (2011); *K&M Electronics*, 283 NLRB 279, 291 fn. 45 (1987). These also serve as evidence of pretext. Again, Respondent does not demonstrate that Farver was engaged in misconduct during her working hours. *Hospital Espanol Auxilio Mutuo de Puerto Rico, Inc.*, 342 NLRB 458 (2004), enfd. 414 F.3d 158 (1st Cir. 2005); *Whirlpool Corp.*, 337 NLRB 726, 726-727 (2002). Given these events, Respondent provides no legitimate business reason for its actions.

Respondent also violated Section 8(a)(1) when McMahon told Farver she could not discuss the meeting, in which she received discipline, with others, which includes other employees. Respondent presented no business justification for the limitation on Farver. The Board explained why this statement was violative:

> "[I]t is important that employees be permitted to communicate the circumstances of their discipline to their co-workers so that their colleagues are aware of the nature of discipline being imposed, how they might avoid such discipline, and matters which could be raised in their own defense." *Verizon Wireless*, 349 NLRB 640, 658 (2007). An employer violates Section 8(a)(1) when it prohibits employees from speaking with coworkers about discipline and other terms and conditions of employment absent a legitimate and substantial business justification for the prohibition. See, e.g., *Lucky Cab Co.*, 360 NLRB No. 43, slip op. at 7 (2014); *SNE Enterprises*, 347 NLRB 472, 491-492 (2006), enfd. 257 Fed.Appx. 642 (4th Cir. 2007); *Caesar's Palace*, 336 NLRB 271, 272 (2001).

Philips Electronics North American Corp., 361 NLRB No. 16, slip op. at 2 (2014). Also see *Aliante Gaming, LLC*, 364 NLRB No. 80, slip op. at 1 (2016).

Respondent presented no rationale for prohibiting this discussion and only a denial to a leading question about whether McMahon made the statement. This statement limited Farver in her ability to communicate about discipline, which is a protected subject of discussion.

Respondent therefore violated Section 8(a)(1) by: telling employees that could not talk about the union; issuing a new rule against talking in the workplace, including talking about unionization; enforced the new rule under *Continental Group*; discriminatorily enforced its solicitation policy; disciplined Farver under *Burnip & Sims* by issuing a counseling and written warning; and told Farver she was prohibited from discussing the disciplinary meeting. Respondent also violated Section 8(a)(3) by giving Farver a counseling and a written warning for engaging in union discussions.

VII. Tim Stewart

With regards to Stewart, the Complaint alleges the following violations: About July 14, Respondent verbally warned Tim Stewart. (Complaint ¶7(d)). About August 21, Respondent issued a written warning to employee Tim Stewart. (Complaint ¶7(f)). About August 21, HR Specialist Emily McMahon, in the presence of Production Supervisor David Lynch and Production Manager Ken Beck, prohibited an employee from talking about the Union because discussions violated Respondent's solicitation policy. (Complaint ¶5(h)).

A. Facts

Stewart was hired by Respondent on August 8, 2013. At the time of the hearing he worked as a bond cap maker for about 2 years. A bond cap makers sews six plies of materials together in three separate rows to make a bond cap, which bonds the two sides of the wind blade together. His most recent performance appraisal, dated August 6, reflected a high score for proficient and only missing advanced, the top level for an appraisal, by one point. At the time of these events, Dave Lynch was his supervisor.

Stewart was involved with the unionization efforts. He attended Union meetings and then spoke with other employees about information from the meetings. While in the work area, Stewart had conversations with employees Jeremy Swan and Lynn Pendroy about the Union, but

denied that either employee said he was harassing them. He did not request other employees to sign authorization cards.

At about 9:00 a.m. on July 13, Lynch handed Stewart a piece of Respondent's anti-Union literature while Stewart was performing his work. Lynch told him, "This is yours to read." Stewart only said, "Okay." About the time he was preparing to clock out, Stewart discussed the literature with a coworker, who just clocked in for his shift. The coworker had just punched in for his shift and was on his way to his work station. By that time, Stewart cut out the picture of the allegedly unionized employees on a picket line. Stewart explained to his coworker that he cut out the piece of the flyer, about the strength of the union, it could pull the company together and "we could all become a stronger company." (Tr. 428). The conversation lasted three minutes. Stewart denied asking the employee to sign an authorization card. Other employees were present waiting to clock in and had talked with the employee before Stewart talked to the employee; however, they did not speak English. Stewart then held up the altered literature and showed what he was doing to Supervisor Nick Stapanek, who was approximately 30 to 40 feet away. Stewart denied asking the employee to sign an authorization card.

Supervisor Lynch testified that employees complained of being pressured, presumably about the union, during work. On cross examination, he identified only one employee, Pendroy, who allegedly complained. Pendroy allegedly told him that Stewart pressured her to sign a union card in the Eastman area. He offered no explanation about any effect on production except to answer to leading questions that it had an effect on production. Lynch did not check the videotapes to verify Pendroy's allegations, nor did he conduct any other investigation into the matter. He did not know if Stewart was passing out authorization cards. Lynch received a report from Supervisor Stepanek that "it looked like" Stewart was giving a speech to a crowd at the end of a mold. Again, Lynch did not ask Stewart what occurred.

On July 14 at about 11 a.m., Boyd sent an email to Van Huysen, Finchum and HR Generalist McMahon about an upcoming union meeting, reported by employees, and that Stewart was "recruiting heavily" that morning. (GC Exh. 26). On the same day, Lynch and McMahon held a meeting with Stewart about the alleged solicitation. Lynch testified that McMahon did most of the talking.

Stewart immediately asked if the meeting was about the Union and repeated the question several times. McMahon denied it each time. Stewart asked if the meeting was about his work ethics, which McMahon also denied. McMahon said that someone told her that Stewart was precluding employees from doing their production work. Although Stewart asked, McMahon did not say who made the accusations. Stewart asked about Stapanek, and she did not answer. McMahon said he was not in trouble, but wanted to let him know not to keep people from their jobs. McMahon said Stewart was not in trouble. Despite this assurance, Respondent later considered this conversation a counseling about solicitation. (Tr. 433; GC Exh. 10). Respondent did not consider this meeting to be discipline during the meeting, but considered that associates reported that Stewart was approaching them about soliciting about the Union. Stewart testified that McMahon did not use the term "solicitation" during the meeting, nor did she tell him to review the solicitation policy in the handbook.

Stewart continued to have conversations with employees about unionization. Another supervisor reported to Lynch that he was talking to people congregated at a mold. Lynch testified that he did not see him himself.

On August 21, Supervisor Lynch issued Stewart a written warning for solicitation on the production floor and during work time. Production Manager Beck, Supervisor Lynch and McMahon held a meeting with Stewart about mid-morning. McMahon gave Stewart the written warning, which Stewart read. The written warning letter stated:

> On August 20, multiple associates reported that you have approached them several times for the purposes of solicitation while on the production floor, and during work time. The associates stated that they have asked you multiple times to stop the solicitation.
>
> The TPI Iowa Associate Handbook states that solicitation is permitted only during non-work time and in non-productive areas, and must not interfere with the work of others. You were previously counseled by myself and Emily McMahon on Tuesday July 14, 2015, regarding engaging in solicitation while on the production floor.
>
> You are being given this opportunity to make improvements in the areas described above. The behavior is against Company policy and is disruptive to operations. Continued infractions will result in further disciplinary action, up to and including the termination of your employment. . . .

Stewart said it was not true and it did not make sense because he never received any counseling. McMahon said it did not matter because other people, whom she did not name, could back up the story. Stewart signed that he received a copy. He went back to his work. Stewart did not recall any discussion of the handbook's solicitation policy in the meeting.

Lynch and Beck testified, in response to leading questions, that they did not discriminatorily enforce the solicitation policies, monitor production floor conversations unless production was affected, or look the other way if solicitation on the work floor took place.

B. Analysis

I consider whether the disciplinary actions violated not only Section 8(a)(3), but whether Respondent unlawfully enforced the no solicitation policy against Stewart in violation of Section 8(a)(1).

1. Credibility

Stewart gave detailed answers to non-leading questions. I discredit Lynch's explanations that Stewart's alleged solicitations interfered with production and whether Stewart actually solicited at all while working. First, Lynch did not conduct any investigation or ask Stewart about what may have happened. I infer that Lynch took the employee's word for it. For the second discipline, he did not see Stewart himself. Lynch concluded that Stewart solicited, but

provides no basis for determining if Stewart actually did so. Stepanek's report was "giving a speech," but nothing else to show solicitation.

Secondly, Lynch first said that the first employee complained he was bothered, without reference to production, not interfering with production. On cross, he did not discuss "employees" who complained, but only one employee. Thirdly, he never explained how production was affected in either situation. Similarly, Respondent's direct examination led Lynch to answer that the employee's complaint he received affected production with a simple "yes." He was also led to answer affirmatively with the question, "Would complaints of coworkers indicate to you production is being affected?" (Tr. 996). The leading testimony is accorded very little weight. See *H.C. Thomson*, 230 NLRB 808, 809 fn. 2 (1977). Further, Lynch did not explain how production was affected.

2. July 14 counseling and August 21 written warning with a further disciplinary threat

Both disciplinary actions violate Section 8(a)(3) and Section 8(a)(1) of the Act. For the Section 8(a)(3) violations, I apply *Wright Line*, as Respondent proffered a legitimate business reason for discipline: The alleged solicitation interfered with production.

Regarding the July 14 counseling, Respondent knew Stewart supporter the employees' unionization efforts, as demonstrated by the July 14 email. In each instance, Respondent allegedly believed that Stewart was soliciting for the union and interfering with production. However, Respondent's evidence of interference with production is extremely limited and not credited. Respondent's timing, in the midst of the organizing efforts, coincided with Respondent's email stating Stewart was "recruiting heavily." Respondent therefore acted quickly to stop Stewart. Notably, the email does not say he was soliciting. Respondent provides no credited reasons to show the July 14 counseling for solicitation was not a pretext for stopping Stewart's efforts. The timing and Respondent's failure to demonstrate any interference with production particularly support a finding of animus and "the pretextual nature of the proferred justification." *Pratt (Corrugated Logistics), LLC*, 360 NLRB No. 48, slip op. at 10 (2014). Respondent does not persuade by a preponderance of evidence that it would have taken the same action without the protected conduct. Id. Therefore, the July 14 counseling violated Section 8(a)(3) of the Act.

After numerous promises in the July 14 meeting that he was not in trouble, Respondent then relies upon this meeting to call the meeting counseling and progress Stewart to a written warning on August 21. This progression of discipline, based upon the July 14 counseling, again demonstrates that counselings are more than just a polite conversation and that Respondent uses them to consider what level of discipline is appropriate for the next perceived violation. Respondent did not show Stewart actually solicited on the work floor, must less interfered with production. When Respondent applies an unlawful rule that regulates union activity during work time, the discipline will be valid only if interference with production or disruption of work is demonstrated. *Cal Spas*, 322 NLRB 41, 56 (1996). As a result, the August 21 written warning also violated Section 8(a)(3) of the Act.

Both disciplines also violated Section 8(a)(1) because Respondent enforced its invalid no solicitation rule.[10] In applying *Continental*, Respondent claimed Stewart was engaged in protected activity of discussing the union, with no evidence in support of interference with production, and subjected him to its unlawful rule.[11] *Etiwanda LLC*, 357 NLRB 2098, 2101 (2011).

The disciplinary action letter applies the overly broad no solicitation rule and threatens to enforce it with further disciplinary action, up to and including discharge. Because the rule is unlawful, a threat to enforce it also is unlawful pursuant to Section 8(a)(1). *Cy-Fair Volunteer Fire Department*, 364 NLRB No. 49, slip op. at 13 (2016). However, Stewart's testimony does not support a finding that McMahon told him he could not talk about the Union on the production floor and that allegation should be dismissed.

VIII. Cindy Mikkelson

The Complaint alleges that Respondent, about August 5, verbally warned employee Mikkelson. (Complaint ¶7(c)). Within that conversation, Boyd also allegedly prohibited her from soliciting employees in the breakroom. (Complaint ¶5(e)). I also consider whether Respondent unlawfully enforced the solicitation rule and, in particular, its limitations on access to the facility.

A. Facts

Cindy Mikkelson has been employed with Respondent for eight years, the last five of which as an eastman. The eastmen frequently talk while they work. She has never been told not to talk to other employees while working. Her supervisor is Dave Lynch.

For the last two years, she worked from 6:30 a.m. to 2:30 p.m., Monday through Friday. However, she normally arrived at the plant at 5 a.m. to get a good parking spot and sat in the break room.[12] During the time before work in the break room, she talked with others who also came in early or played games on her phone.

In early May, Mikkelson became involved with the unionization efforts. On August 4, while in the break room before her shift, she handed out union cards. On August 5, Shift Leader Josh Cobler took Mikkelson to HR Manager Boyd's office; Cobler stayed for the meeting. Boyd told her she was not in trouble but said it had been brought to his attention that she was soliciting both August 4 and 5. Mikkelson agreed that she gave out cards on August 4, but denied

[10] I would reach the same result with an analysis under *Burnip & Sims*, supra, as Respondent does not demonstrate that Stewart violated its solicitation rule.

[11] The rule was also applied discriminatorily based upon McGlothlin and Boyd testimonies about sales on the floor respectively by an employee and supervisors. Respondent produced no evidence about giving discipline to any of the supervisors for violating the rule, yet twice disciplined Stewart, which again violates Section 8(a)(1).

[12] Other employees testified that they arrived early to find good parking spots. Respondent attempted to adduce testimony that parking would be available but perhaps not a spot one might desire. Anyone who has been to a shopping mall on Black Friday can attest to the power of arriving early to find a desirable parking spot.

distributing cards on August 5. Boyd told her she could not pass out cards while on company property or come in early. Mikkelson asked if she could come in early even if she did not hand out cards. After some conversation, Boyd told her coming in early was a safety issue and she should not come in until her shift time. Mikkelson explained how parking was a safety issue. Boyd also said that she upset people. She also said she did not tell a janitor, Lee Ann Current,[13] to sign a card. She further told Boyd that he needed to tell everyone that they were not permitted to come in early. He did not respond to that remark. She also told him that he could check the video cameras to see who came in early. Mikkelson denied that Boyd showed her the solicitation policy but Boyd put his hand on the handbook and said, "You should not be here 30 minutes before your work time."

After the meeting, Mikkelson still arrived at the plant about 5 a.m., but waited until another eastman employee, Kathy Fox, texted her from the break room that it was safe to come in. She never brought the cards into the plant and instead handed them out in the parking lot. Others also had a history of coming into the facility's break room before a shift to share a meal, including the McKinstrys.

As previously noted in the history of the attempted unionization, on Wednesday, August 12, Boyd emailed the HR management team and supervisors about solicitation and distribution, including activity ". . . significantly before or after their assigned shifts." Boyd stated that employees could not be in the facility earlier than their scheduled shift per Respondent's handbook rules, and certainly not 1 ½ hours before shift. He encouraged them to particularly monitor break rooms for early and late employees. Boyd further instructed that any solicitation and distribution must be immediately handled through progressive discipline. (GC Exh. 35).

The next day, Supervisor Lynch emailed Boyd that he and Cobler gave Mikkelson a counseling about her presence in the break room 1 1/2 hours before her shift began. (GC Exh. 36).[14] The disciplinary log does not contain a record of the August 4 coaching, although it contains records of other coaching Mikkelson received during July and August. The August 13 incident was recorded as a performance coaching, stating: "Coached regarding solicitation & distribution at least 1 hour before the beginning of the shift – Boyd & Cobler." (GC Exh. 81).

Boyd denied that Mikkelson received any discipline due to the above events, yet stated Mikkelson was counseled. He stated Mikkelson could not be in the facility 1 ½ hours before her shift because of safety and security issues. As a result, she could not be in the facility until time to clock in, or 15 minutes before her shift. Boyd testified that a maintenance mechanic spent a good deal of time in facility and may have been sleeping there, which was addressed through his supervisor. He also testified that employees brought in children before or after the shift when childcare did not work out, and that management told these employees to stop. Boyd did not check the video cameras despite Mikkelson's suggestion; he said he relied upon members of

[13] According to Mikkelson, Current works throughout the facility. Mikkelson testified that Current, in the break room, told other employees, including herself, that management sometimes asks her questions and at other times, Current said she volunteered information.

[14] Although not specifically alleged, I consider this event because it is closely connected to the subject matter of the complaint, Mikkelson's previous counseling, and as evidence was presented, it has been fully litigated. *Pergament United Sales, Inc.*, 296 NLRB 333, 334-335 (1989), enfd. 920 F.2d 130 (2d Cir. 1990).

management and could not check into every piece of information received. Boyd claimed he was unaware of others who came in as early as Mikkelson until he received an email, dated August 21, from McMahon. The email stated the McKinstry family came in early for their shifts and stayed in the break room. (GC Exh. 39). Mr. McKinstry was a known union supporter and Boyd took no action. Boyd denied Mr. McKinstry received any discipline for doing so. Respondent presented no evidence that anyone else had been disciplined for staying late or coming in early to the break rooms, despite Mikkelson's testimony that others were present as early as she was.

B. Analysis

I fully credit Mikkelson's version of events. I discredit Boyd to the extent he stated that Mikkelson did not receive discipline. Respondent used counselings as a basis for progressive discipline in several instances, as seen throughout this case. I also do not rely upon his representation that Respondent did not selectively enforce this policy against Mikkelson to stop her from discussing the Union before shifts or that Boyd was completely unaware that others were entering the plant earlier than 15 minutes before a shift. As Mikkelson noted in her conversation with Boyd, Respondent maintains video cameras in the break room and could have seen who else was present. Indeed, others were present at the same time and Respondent presented no evidence others were disciplined. It cannot be coincidental that the first counseling occurred the day after Mikkelson started soliciting signatures for authorization cards when she previously arrived early. The August 12 email also shows that Boyd instructed supervisors to monitor early arrivals and departures: Respondent obviously considered this measure necessary to monitor union discussions, solicitation and distribution and to effectuate its goals in stopping the unionization efforts.

Respondent's statement about children in the plant and stopping the practice is not the same as stopping employees from entering the facility. Children are not employees and are considered third parties. Employees, however, have access unless special circumstances exist. Respondent's special circumstances are only averred in Boyd's testimony regarding safety and security. These reasons do not outweigh an employee's right to associate with fellow employees to exercise Section 7 rights, particularly when other employees testified credibly that they have arrived early for some time. It is also questionable that Respondent suddenly had these concerns when Mikkelson and others regularly came in early. Therefore, the rule was unlawfully enforced. *St. John's*, 357 NLRB at 2082.

As noted, Respondent used counselings as a basis for progressive discipline. Mikkelson was engaged in solicitation for union cards, a Section 7 activity. According to *Continental Group*, supra, the overly broad rule was applied to her Section 7 activity, which violates the Act. Respondent's August 12 email, although after the fact, demonstrates an intent to stop union activity. Mikkelson was the subject of an unlawful rule when Respondent enforced it, which violated Section 8(a)(1).

Respondent also violated Section 8(a)(1) when Boyd told Mikkelson that she could not distribute cards in the breakroom. *Smithfield Packing Co., Inc.*, 344 NLRB 1, 28 (2001), enfd. 447 F.3d 821 (D.C. Cir. 2006).

The two disciplines violated Section 8(a)(3).[15] I do not credit Respondent's denials that it had no idea that she initially was engaged in solicitation in the break room. Timing initially demonstrates that Respondent knew of her union activities: She solicited one day and received discipline the next. In addition, crediting Mikkelson, Boyd told her she could not distribute the cards. The August 12 email, tied with union activities, also demonstrates animus and intent to prevent union activity in break rooms by limiting time for employee interaction. Disparate treatment also demonstrates knowledge and animus as Mikkelson was the only person with any documented discipline for this restriction. Although Respondent did not discipline the McKinstrys for early access to the facility, Respondent need not discipline all union adherents. With the burden shifting to Respondent, its rationale for prohibiting Mikkelson's access, alleged safety concerns, is undermined by disparate treatment.

Respondent's position is further undermined by its August 13 entry in the disciplinary log, stating that Mikkelson was disciplined for solicitation and distribution at least one hour before her shift. That entry contains no information about Respondent's concerns about safety. This restriction also violates the third prong of *Tri-County*, supra, as the access and solicitation rules were not applied to all without regard to union activity, but selectively to Mikkelson because she was identified as engaging in solicitation and distribution.

This situation has similarities to *Brandeis Machinery & Supply Co. v. NLRB*, 412 F.3d 922, 834-835 (7th Cir. 2005), enfg. 342 NLRB 530 (2004): Employees had been using lunch times to discussion unionization with other employees. The employer, like Respondent, was aware of the union campaign. The employer then staggered and cut the time for employee lunches based upon a reason of improving customer service. The employer failed to show it would have taken the same action in the absence of an illicit motive; Respondent here does not show the absence of an illicit motive either. Similarly, the employer waited to enact this change until union activity was present in the break areas. Respondent waited to enforce its rule until union activity was present. The court enforced the Board's finding of a Section 8(a)(3) violation.

Therefore, Respondent, in violation of Section 8(a)(1), unlawfully applied its rule to Mikkelson and, in violation of Section 8(a)(3), discriminatorily disciplined her because of the union activities.

IX. Brian McKinstry

The Complaint alleges Section 8(a)(1) violations taking place on July 1, which involve both Brian McKinstry and his wife, Deanna. (Complaint ¶¶5(a)-(c)). The Complaint also alleges Respondent further violated Section 8(a)(3) on three occasions involving Brian McKinstry: On July 1 and August 12, Respondent verbally warned employee Brian McKinstry. (Complaint ¶¶7(a),(d)); and, about August 24, Respondent issued a written warning to Brian McKinstry that would have been lesser discipline but for the prior warnings. (Complaint ¶7(h).

[15] I find similar violations for the reports by Respondent in the August 13 email that it counseled Mikkelson again. Although not specifically alleged, it is a continuation of the alleged conduct within a short period of time and the remedy will be the same. I consider Respondent's August 13 email as an admission against interest by a party-opponent. See Fed. R. Evid. 801(d)(2). The document was subpoenaed by General Counsel from Respondent.

A. Facts

Deanna McKinstry (Ms. McKinstry) has worked in mold for over three years. In molds, employees do get coats, lay-up and closing. She works 3 p.m. to 11 p.m., Monday through Friday, plus some Saturdays with mandatory overtime. Her husband, Brian McKinstry (Mr. McKinstry), also works at the facility but he has a shift that begins at 2:30 p.m. She and Brian arrive at work early every day and eat lunch in the break room.

Mr. McKinstry, who was a team leader at the beginning of these events, became a 2KM operator during the course of these events. On June 15, Mr. McKinstry received his appraisal as a team leader. Regarding quality, the appraisal stated McKinstry owned up to quality and had good communication with incoming and outgoing team heads. His overall numerical rating was in the higher end of the proficient range, which was below the advanced rating range and above the satisfactory range.

Mr. McKinstry began working with the Union's organizing committee a few weeks before he received a counseling on July 1. He attended union meetings on Tuesdays and Thursdays before going to work. He obtained Union cards on June 30. On July 1, before his shift in the break room, he passed out the cards for signatures on July 1. He told employees that they could return the cards to his wife because she clocked in later than he did. He continued to talk about the Union during breaks and, if asked questions while working, he would talk while continuing to work. However, he denied strenuously that he handed out any union cards on the work floor. (Tr. 318). He denied that the talk disrupted production. (Tr. 319). Boyd denied any knowledge of any union activities until July 1.

1. July 1 meeting in the Fishbowl

On the afternoon of July 1, Mr. and Ms. McKinstry were called to a meeting with Cleo Boyd, Allen Finchum (operations manager) and Shift Leader Luke Coady. The meeting was called ostensibly to talk to the McKinstrys about their conduct after Ms. McKinstry applied for a job in the quality department and the job was given to an unqualified employee. Ms. McKinstry previously discussed with Boyd the selection and Boyd found that the selected employee did not have the qualifications to perform the position.

Shortly after clocking in on July 1, Coady called Mr. and Ms. McKinstry into a meeting in the Fishbowl, with HR Manager Boyd and Operations Manager Finchum present. Boyd told them that there was a new procedure about posting the procedures and qualifications for quality assurance jobs, which Ms. McKinstry had brought to Boyd's attention earlier after she was not selected for a position. Boyd testified the purpose of the meeting was to inform Ms. McKinstry about the new posting procedure and requirements for the position and to discuss that both Mr. and Ms. McKinstry were dismissive and disrespectful to employees in the quality department. (Tr. 742). Finchum also asked Mr. McKinstry if he was avoiding talking to the quality supervisor and an associate. Mr. McKinstry denied any problems communicating with the quality people and offered to "clear the air" with them.

According to Ms. McKinstry, either Boyd or Finchum said that the main reason they were brought to the office was to ask if they were "rallying" employees against Respondent and for the union. (Tr. 235).[16] Finchum said they felt that the McKinstrys were rallying people against management. Both McKinstrys denied doing so and offered that they "loved the company." (Tr. 235-236). Mr. McKinstry testified he denied rallying anyone, that he loved the company and did not want any problems. Finchum said they needed to prove it and if they were doing anything of the sort again, he would take "drastic measures." Mr. McKinstry testified Finchum said if he heard anything further about the disagreements or failure to communicate with quality or rallying employees against the company, he would take drastic measures. (Tr. 278). Finchum did not say what he meant by "drastic measures." (Tr. 236).

Finchum testified both employees were counseled about disrupting and arguing associates on the floor. Finchum denied the term "rallying" was used and denied any statement about drastic consequences. He also denied asking them to prove that they loved their jobs. He said one of them at the conclusion of the meeting said, "Well, we love our job, and so that you," and "We won't let it be an issue." Manager Coady testified to leading questions that echoed Finchum's testimony. (Tr. 1168-1170).

Boyd's testimony was primarily to leading questions. Boyd denied that he discussed the solicitation policy with them or any beliefs on unionization. Boyd denied that anyone used the term "rallying" during the meeting, or that Finchum use terms of "drastic" or "dire consequences."

2. August events

In August, Mr. McKinstry transferred to 2KM, where his process coordinator was Josh Peterson and Manager was McGlothlin. Mr. McKinstry testified that Peterson asked Mr. McKinstry questions about the Union. He told Peterson he had union authorization cards, but never asked him to sign one. According to McKinstry, Peterson never told him to stop talking about the Union, nor did he tell McKinstry that he felt harassed. No other employees told McKinstry they felt harassed and he denied interrupting anyone's work to discuss the Union. McGlothlin testified that Peterson told him that Mr. McKinstry continually asked him to support the Union and hand out cards, but Peterson never mentioned production. McGlothlin did not check the video cameras about these incidents. Although McGlothlin said he normally wants both sides of a story, he skipped talking with McKinstry because it was union related and instead directly consulted with HR Manager Boyd. (Tr. 1094-1095).[17]

Respondent's brief characterized McGlothlin's testimony as Peterson complaining that McKinstry was interfering with his work because Peterson allegedly said McKinstry was "continually" talking to him on the production floor, over two to three days and asked him to

[16] Respondent's brief identifies that Ms. McKinstry's affidavit put the blame on Boyd, but she could not recall at hearing whether Boyd or Finchum made the statement. She did not attempt to have the affidavit, which was three pages, corrected. However, her testimony here was forthright and explained the difference.

[17] McGlothlin testified to leading questions that McKinstry could have rebutted the allegations when he received the discipline. (Tr. 1096).

hand out cards. However, nothing about McGlothlin's testimony about Peterson's reported complaints include a statement of interference with production. (Tr. 1065-1067).

On August 12, HR Manager Boyd, with Manager McGlothlin, counseled McKinstry in Boyd's office for solicitation on the work floor. McGlothlin said he heard McKinstry was harassing or bullying employees about the Union. McKinstry said that was not how it would be done. Boyd pulled out the handbook and pointed out a provision that stated employees could not solicit in the facility. (Tr. 283). Boyd testified he told Mr. McKinstry he could support the union, so long as he solicited in line with the company policy. They said they heard he was passing out cards and flyers on the work floor, which McKinstry denied.

McGlothlin told him he saw him on the plant's video with pamphlets in his hand. McKinstry said it was an anti-Union flyer, which he picked up around the trash and read as he walked towards the molding area. (GC Exh.7). McGlothlin testified that Boyd pointed out the solicitation policy, particularly no solicitation during work time. In response to leading questions, McGlothlin testified that McKinstry did not deny soliciting.

On August 27, McGlothlin gave a final written warning to McKinstry for allegedly not working as a 2KM operator for at least 1 1/2 hours on August 26. During that time, Respondent stated he walked through the plant, talking with other associates in the production area. (GC Exh.7). McGlothlin based his determination to discipline Mr. McKinstry based upon a report from Process Coordinator Peterson, who allegedly said that McKinstry was not answering his radio on the production floor during work time, and supposedly was needed to work the paste or resin machine. (Tr. 1070, 1084). McGlothlin testified he then reviewed the video cameras on his computer and saw McKinstry visiting people between molds 5 and 6 and not working for about 1 ½ hours. (Tr. 1073-1074). Respondent did not retain a copy of the video. Ironically, except for safety issues, McGlothlin otherwise never checked the videos. (Tr. 1087).

McKinstry testified he may have been walking around for five minutes, but not 1 ½ hours, and instead had been directed to work in another area. McKinstry testified that 2KMs do not have a specific area, but go to mold needing infusions, bead runs, closing or in the fish bowl area filling machines. Each day, the process coordinator instructs the 2KMs where they need to go to assist with tasks. McKinstry was still in training at the time and backup team.

McKinstry said Process Coordinator C.J. Vanderveer initially told him to fill the machines. After filling the machines, McKinstry asked Vanderveer what was the next task to do. McKinstry completed another task and asked Vanderveer again for another task. Vanderveer told him that he had nothing for him to do until mold 5 was ready to close. McKinstry went to mold are 1 and assisted with procedures there. McKinstry heard on his radio that he had to go to mold 5 to close. He assisted with closing, but someone neglected to remove the tip fixtures. The molds were damaged. Again, McKinstry asked Vanderveer what he wanted him to do, and Vanderveer said nothing, because the plate was damaged. Vanderveer told McKinstry he could sit in the break room. He instead offered to assist with the repairs on the damaged mold. In the process of repair, McKinstry talked with the engineers and others about the repair.

The following day, McGlothlin brought Mr. McKinstry into Boyd's office for the counseling. According to Mr. McKinstry's testimony, McGlothlin said he was wandering

around the mold. McKinstry said that the backup/process coordinator was not qualified to run the shift. McKinstry stated the backup was in charge. McGlothlin said McKinstry was free to go and it would be discussed later. At a later meeting, McGlothlin gave him the final written warning. They were alone in McGlothlin's office. McKinstry told McGlothlin he did not understand why he was receiving the discipline. McGlothlin told him to keep himself busy doing 2KM tasks. McKinstry said he was new to the 2KM position but he would do what the person in charge told him to do. He signed the notice that he received it and asked for a copy. Mr. McKinstry provided no written rebuttal to the discipline because he verbally disputed it. In hearing, when Respondent asked Mr. McKinstry if he admitted to Boyd and McGlothlin he had this non-productive time, McKinstry answered, "I can't say yes and I can't say no." However, he said he provided the same information he gave in his testimony. (Tr. 331).

McGlothlin testified to mostly leading questions that Mr. McKinstry was presented with the letter and discussed with him that he was away for an hour and half, which McKinstry did not deny.

Boyd testified that McKinstry admitted he walked around for 1 ½ hours, but did not admit to soliciting. (Tr. 749). Boyd further testified that he and McGlothlin both reviewed the video, which was not retained after two weeks) and said it showed McKinstry walking around with a piece of a paper, talking to another associate about the paper for about 30 to 45 seconds; he then left the mold, put the paper in a cubby on the production desk and walked through the plant for 1 ½ hours. Boyd denied he was disciplined for soliciting in this incident, but disciplined for inattentiveness to his job duties. (Tr. 750-751).

Boyd also testified that the final warning mentioned the prior solicitation discipline because the two were related, yet denied the second discipline was due to solicitation. I find these statements to be contradictory as Boyd not only relied upon the discipline for solicitation, but found that McKinstry's conduct resulting in the second discipline was related to solicitation.

A few times after his August 24 discipline, McKinstry reported to McGlothlin that Process Coordinator Peterson was sitting outside for periods of five to six hours each time. Peterson was eventually terminated. (Tr. 338-339). Except for Mr. McKinstry's statement that Peterson was fired for staying out of the plant for these long periods, the record does not include why Peterson was terminated. Respondent did not rebut McKinstry's reports.

C. Analysis

1. July 1 discussion

a. Section 8(a)(1) allegations

The McKinstrys' testimonies substantially agree with Respondent witnesses regarding the conversation involving the quality position and interactions with other employees on the floor, the agreement ends there. Respondent would have good reasons for discussing the job qualification issues with the McKinstrys, but the question is whether the conversation went off the rails.

Credibility is key to determining these allegations. According to Respondent, Ms. McKinstry denied anyone used the phrase "rallying the troops." However, this conclusion is not supported by the record.

Boyd and Finchum had a significant discrepancy regarding when they had knowledge of the Union campaign. Although Boyd denied any knowledge of union activities in the plant before this time, Finchum admitted knowledge in June. This inconsistency is cause for concern: Neither testified about communicating with each other when Finchum discovered union activity and it seems Respondent would expect us to believe that Finchum kept this knowledge to himself. Because of this discrepancy and the fairly close consistency of the McKinstry testimonies, I credit the two employees, who testified against their employer, over the two Respondent witnesses.

The Board considers the totality of the circumstances in assessing the reasonable tendency of an ambiguous statement or a veiled threat to coerce. *KSM Industries*, 336 NLRB 133 (2001); *Mediplex of Danbury*, 314 NLRB 470, 471 (1994). The test for coercion is objective. *G4S Secure Solutions (USA) Inc.*, 364 NLRB No. 92, slip op. at 2-3 (2016). In assessing whether a statement constitutes a threat, the appropriate test is "whether under all circumstances the employer's conduct reasonably tended to restrain, coerce or interfere with employees' rights guaranteed by the Act." *Mediplex of Danbury*, 314 NLRB at 471-472. "[T]test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed." *American Tissue Corp.*, 336 NLRB 435, 441 (2001), citing *NLRB v. Illinois Tool Works*, 153 F.2d 811, 814 (7th Cir. 1946). Also see *G4S*, supra. The "threats in question need not be explicit if the language used by the employer or his representative can reasonably by construed as threatening." *NLRB v. Ayer Lar Sanitarium*, 436 F.2d 45, 49 (9th Cir. 1970). The credited threat to take "drastic measures" for continuing union activities is coercive. See generally *Eddyleon Chocolate Co.*, 301 NLRB 887, 898-899 (1991).

b. Section 8(a)(3) allegations

The disciplinary action log reflects that on July 1, both Mr. McKinstry and Ms. McKinstry received coachings for their alleged problems in communicating with the Quality department. (GC Exh. 81). The complaint only alleged Mr. McKinstry's discipline, and I therefore limit my discussion to that issue.

In applying *Wright Line*, the record reflects Mr. McKinstry's involvement with unionization efforts before July 1, including solicitation in the breakroom on June 30. The record reflects Respondent knowledge with its statements to the McKinstrys.

"The Board . . . [has] long recognized that the close proximity of protected conduct, expressions of animus, and disciplinary action can support an inference of improper motivation." *Inova Health System v.* NLRB, 795 F.3d 68, 82 (D.C. Cir. 2015). Timing of Respondent's actions demonstrates that Respondent held anti-union animus. *Masland Industries*, 311 NLRB 184, 197 (1993), quoting *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984) ("Timing alone may suggest anti-union animus as a motivation factor in an employer's action"). Combined with the independent Section 8(a)(1) violation in the same meeting and the accusation of "rallying the troops," animus is proven.

As General Counsel has proven a prima facie case, I turn to Respondent's reasons for Mr. McKinstry's discipline: On July 1, Respondent said Mr. McKinstry allegedly was not communicating well with the Quality personnel as a result of Respondent's failure to select his wife for a position. This statement is undermined by its June 15 performance appraisal, which found he "owned up" to quality and cited no difficulties in communication. As previously noted, timing and expressions of animus were also present. I therefore find that Respondent has not carried its burden of persuasion and Mr. McKinstry received a counseling on July 1 due to his union activities on the previous day. *Inova v. NLRB*, supra.

2. August 12 counseling

Respondent did not call Josh Peterson to testify. Although Peterson reportedly is no longer in Respondent's employ, he was not present to corroborate McGlothlin's reports and state that McKinstry interfered with his work. I take an adverse inference that Respondent failed to present Peterson as the "first hand" witness, presumably disposed to favor Respondent given his reports, to McKinstry's alleged solicitation. *Battle Creek Health System*, 341 NLRB 882, 887 (2004).

I first look to an analysis under *Burnip & Sims*. Mr. McKinstry was responding to questions about the union to Peterson. Respondent contended that McKinstry interfered with production as the misconduct. However, Respondent did not support its contention that Mr. McKinstry interfered with production and made a leap in interpreting the transcript. As noted before, employees have a statutory right to engage in Section 7 activity even when other employees are disturbed or bothered. See generally *Care One at Madison Avenue, LLC*, 361 NLRB No. 159, slip op. at __. Being bothered is not the same as interfering with production. As Respondent fails to show McKinstry interfered with production, McKinstry did not engage in any misconduct and the disciplinary action violates Section 8(a)(3). *Cal Spas*, supra.

Respondent also violated Section 8(a)(1) by enforcing its unlawful solicitation rule. According to *Continental Group*, Respondent perceived that McKinstry violated its unlawful solicitation rule, which touches on Section 7 concerns.

3. August 27 written warning for leaving the work area

I find that the final written warning violated Section 8(a)(3). The allegation is limited to whether the warning was warranted because Respondent previously gave unlawful discipline.

As with other disciplines in this decision, it also relies upon an earlier unlawful discipline which progressed Mr. McKinstry to a final written warning. The discipline would also be unlawful upon that basis as well and must be rescinded. *St. George Warehouse, Inc.*, 349 NLRB 870, 878 fn. 27 (2007).

X. Douglas Vollers III

The Complaint alleges that on October 16, Respondent terminated Douglas Vollers III because of his union activities and sympathies. (Complaint ¶7(k)).[18]

A. Facts

Douglas Vollers III (Vollers III), Vollers II's son, was employed by Respondent from October 2012 until October 16, 2015, when Respondent terminated him for using his cell phone in a work area. He worked as a wet layup associate, laying laminates of the leading and trailing edge side of the wind blade, and reported to Supervisor Joe Reynolds (Supervisor Reynolds). His process coordinator was Susie Harlow.

1. Prior disciplinary record and claimed union activities

Vollers III had discipline prior to the events that led to his termination. In December 2014, Vollers III received a written warning for use of his cell phone. Vollers III stated he dropped his phone out of his pocket, picked it up to check the screen for cracks. His process coordinator saw him and reported him to Reynolds, which resulted in a written warning. Supervisor Reynolds testified that Vollers III carried his cell phone in his tool bucket. Yet Vollers III testified Supervisor Reynolds only said to not let the cell phone get in the way of his work.

Although some employees were permitted to use their phones for listening to music while they worked, Supervisor Reynolds testified employees were not permitted to use the phone for texting or other communication during work. Supervisor Reynolds reminded Vollers III four times that he was not to use the cell phone in the production area. The first reminder was a verbal "talking," which progressed to a coaching, which he sent to HR. (Tr. 1127-1128). Vollers III verbally disputed that he was talking on the phone, but Supervisor Reynolds had seen him.

Vollers was given a written warning on January 13 and final written warning on May 28, both of which were for low work performance. Supervisor Reynolds stated Vollers III had getting ready for work and standing around talking when he should have been working and that he missed a lot of work, many times for getting his tattoos done and then when he was showing other employees afterwards. Vollers did not contest either of the warnings until after he was terminated. He had previous counselings for attendance. Supervisor Reynolds discussed proper job behavior with him.

In July, Vollers II filed an OSHA complaint on behalf of Vollers III. The complaint alleged Respondent did not provide sufficient respiratory protection. OSHA found no fault with Respondent over the complaint. The OSHA documents did not reveal who filed the charge. Boyd denied knowledge of who filed the OSHA charge until the hearing.

[18] At hearing, General Counsel stated he did not allege that Vollers III was terminated pursuant to an unlawful rule. (Tr. 342). I therefore do not consider whether the cell phone policies were unlawfully applied.

Vollers III maintained that he was involved with the 2015 Union organizing campaign. He testified he became involved later in the campaign, after his father became involved. He said he attended meetings and tried to get employees to sign cards. Vollers III also contended that he had conversations with Supervisor Reynolds about unionization when Supervisor Reynolds weekly distributed flyers to employees. The conversation was limited to Vollers III telling Supervisor Reynolds to "save a tree." Despite Vollers III's statement, Reynolds gave him a flyer. However, Supervisor Reynolds testified that he did not recall any such statement from Vollers III, who took the flyers when handed out.

Vollers III attended two meetings regarding unionization at the facility. He maintained that the employees met with a "lady" in October. She showed videos, talked about the pros and cons of unionization and her own experiences with unions. Here, Vollers III initially testified that he did not recall any specific things he said, and left before the question and answer period because he was "tired of hearing it."

2. Events leading to discharge

Vollers III testified he wore a navy IBEW t-shirt on Monday, October 12, a few days before his termination and the same day when he allegedly was injured on the job when he fell off a scaffold. He complained of a back injury and reported it to Harlow and Supervisor Reynolds. Plant Manager Reynolds came to the work floor and asked Vollers III if he needed to go to the hospital. Vollers III did not think he needed to go the hospital. He was advised to notify Respondent upon arriving at work if he had pain the following day. On October 13, Vollers III reported having more pain and was placed on work restrictions.[19]

On Friday, October 16, the day of the events leading to termination, Vollers III testified he called the plant call-in number before his 2 p.m. start of shift because he believed he would run late after dropping his grandmother off at the hospital to care for his great uncle with liver problems, which Vollers III characterized as minor medical issues. However, Vollers III made it to work on time and attended the plant-wide startup meeting as usual. After the startup meeting, he walked up to Supervisor Reynolds and Team Leader Harlow. Vollers III heard them discussing why another employee, Aaron Perrin, was not present. About that time, Perrin called Vollers III's cell phone. Vollers III asked Supervisor Reynolds if he could answer his cell phone outside in the smoke shack, a nonworking area. Vollers III's testimony about the conversation was somewhat confusing, but the upshot was Vollers III asked Supervisor Reynolds if he wanted him to pick up Perrin because Perrin was having car trouble. Supervisor Reynolds supposedly talked with Plant Manager Reynolds about it.

Vollers III testified that, sometime after Supervisor Reynolds talked to Plant Manager Reynolds, he asked Supervisor Reynolds if he could use his cell phone in case of emergency in case he received a call from his grandmother. No one was present when they had the cell phone discussion. Vollers III testified that Supervisor Reynolds gave him permission and then swept the floor until about 5:10 p.m. At that time, Process Coordinator Harlow sent him to work on wet

[19] Vollers III did not see a doctor until Monday, October 19, after his termination.

layup. Vollers III protested, saying he was on light duty until he could see a doctor. Harlow disagreed because he had not seen a doctor yet.

Vollers III obtained his personal protection equipment (PPE) and went to the wet layup table. He placed his phone in another employee's work bucket. While he donned his PPE, his cell phone "went off" and he checked the phone, which had a text message from his grandmother about his uncle. Vollers III then replaced his phone in the work bucket. Vollers III testified that two other employees were also using their phones: Logan Smith, who was next to him, was looking for music to play on his cell phone while he worked; Jordan showed a 3-minute video of him playing a video game. Vollers III stated he worked until his break, about 6:10 p.m. During his break he spoke with Supervisor Reynolds and advised him that his uncle's condition was worsening. He said he double checked with Reynolds if he still could use his cell phone and received permission to do so.

Supervisor Reynolds testified Process Coordinator Harlow reported Vollers III using his cell phone again on the work floor. Vollers III voluntarily came to Supervisor Reynolds' desk and said, "If anybody comes and says they seen me on my cell phone, I was texting to see how my uncle was." Supervisor Reynolds replied, "Doug, you ain't supposed to have your phones out on the floor." Vollers III said, "Well, my uncle's in the hospital." Reynolds advised, "Well, still, if there's something wrong, we've got the emergency phone nowadays that they can call." (Tr. 1146-1147; R. Exh. 27). Supervisor Reynolds sent Vollers back to work and called Plant Manager Dale Reynolds. (Tr. 1147-1148).

After the break, Supervisor Reynolds and Plant Manager Reynolds called Vollers III into Plant Manager Reynolds' office. Plant Manager Reynolds told Vollers III that he was being sent home for using his cell phone on the work floor. Vollers III asked if he was joking. Supervisor Reynolds reported that Vollers III was giggling. Plant Manager Reynolds said he was not joking and Vollers III was escorted out of the plant.

On Monday, HR Generalist Wildman checked her email and found she received an email from Friday about Vollers III's suspension. She also received notes from Harlow and Supervisor Reynolds. Wildman researched Vollers III's disciplinary history in the computerized log. (R. Exh. 18). She then called Vollers III to come in to give his statement.

Vollers III met with Wildman and McDade in the board room. McDade asked him questions, including about prior disciplinary action, and then asked about his other warnings for cell phone use on the floor of the plant. Vollers III agreed he had a prior written warning for cell phone use. Vollers III also admitted that he received the employee handbook but never read it. He also told Wildman and McDade that Supervisor Reynolds gave him permission to use the cell phone to check on his uncle. When asked what he thought would be an appropriate punishment, Vollers III offered that he should not be fired but should have an unpaid suspension for a few days and asked for a second chance.

Boyd, who was ultimately responsible for determining to terminate Vollers III, testified he had no knowledge of the alleged union activities. He reviewed the notes of the investigation and Vollers III's previous disciplinary actions. He also discussed the matter with Wildman, McDade and Supervisor Reynolds. Wildman and McDade recommended termination.

Supervisor Reynolds also recommended termination because Vollers III violated a number of policies, including attendance, work performance and the cell phone policy. Boyd decided that Vollers III's overall record warranted termination for this offense.

On October 20, Wildman telephoned Vollers III and told him he was terminated him due to his repeated use of a cell phone at work. He said to Wildman that he had only done so one time and she corrected him that it occurred multiple times. Before she terminated Vollers III, she had no knowledge of his union activities or those of his father.

After termination, on November 3, Vollers III filed with the Iowa Workforce Development Commission a complaint alleging he was terminated for pursuing an OSHA complaint against Respondent. (R. Exh. 3). The complaint was dismissed (R. Exh. 2) and pending appeal at the time of the hearing. Vollers II later filed a charge with the NLRB regarding Vollers III's termination.

Respondent presented two performance appraisals for consecutive years, signed by Supervisor Reynolds. The most recent appraisal occurred on October 15, the day before the cell phone incident. The performance appraisal ratings remained the same, which still included several areas marked "needs improvement."

3. Disparate treatment evidence

Whether others were permitted to use cell phones while working was disputed. General Counsel presented employee testimony of anecdotal evidence and Respondent's disciplinary records. For the anecdotal evidence, Vollers III testified that he saw Process Coordinator Harlow showing pictures of her grandchild in front of a machine, but did not mention this incident to Wildman and McDade during the investigation. No evidence demonstrates that Respondent knew Harlow was using her phone. Even if this incident is credited, it does not demonstrate that Respondent was lax in its enforcement.

Vollers II contended he saw employees violate the cell phone policy daily and told employees not to have their phones out. (Tr. 54). He also observed Supervisor Brannan texting, ordering pizza, and talking with his wife. Mikkelson also saw employees on phones in the Eastman area, including Supervisor Dave Lynch, who showed personal pictures of hunting and fishing trophies and fishing lures that he makes for sale on the internet. In some cases, employees saw supervisors talking on phones but were unable to discern whether they were conducting company business.

Other anecdotal evidence points to supervisory enforcement. Mr. McKinstry testified that he saw employees using cell phones and management told them to put them away. (Tr. 295-296). Ms. Kinstry saw production employees using cell phones on the floor and told them not to use it. She did not see any supervisor instructing employees to turn cell phones off.

Regarding the disciplinary records, Boyd testified that no one was terminated on the first incident for cell phone use. (Tr. 883). General Counsel cites employee David Wilson, a quality inspector, as an example of disparate treatment. His first written warning for cell phone use occurred in February 2013. (GC Exh. 74). Almost two years later, in January 2015, Wilson

received a final written warning for job performance. On March 5, he received a verbal warning for cell phone usage for two consecutive days. Almost five months later, Wilson received a final written warning for using his cell phone and non-productive activity for the previous week. On February 9, 2016, Wilson received a 2-day unpaid suspension for job performance and giving attitude when his supervisor discussed it with him. I also considered Dustin Merschbrock, who was a warehouse worker who was on the cell phone and not working. Merschbrock had a history of extended breaks and leaving the area without working over a 2-month period. Boyd admitted Merschbrock should have been terminated sooner but was unable to do so because the supervisors mishandled earlier disciplines. (GC Exh. 60). Brian Lee was given a verbal warning for using a cell phone by an oven; 2 months later, he was disciplined for inappropriate behavior on the work floor. (GC Exh. 58).

B. Analysis

1. Credibility

Respondent's witnesses testified credibly regarding Vollers III's termination and events leading up to it. Supervisor Reynolds' testimony reflected his reasons for prior discipline and his frustration with Vollers III as a less than reliable employee. He described his discussions with Vollers III and how his behavior impacted the team as a whole. Supervisor Reynolds testified credibly that Vollers III did not have permission to use his phone for this occasion.

I also credit HR Generalist Wildman's detailed presentation about the investigation and her recommendation to terminate Vollers III. Wildman's testimony during direct examination was to non-leading questions and she provided complete answers. Wildman presented a coherent rationale for terminating Vollers III, and I credit her explanation. I also credit HR Manager Boyd's testimony that he relied upon Vollers III's previous disciplinary record to make the ultimate decision to terminate him.

Vollers III's testimony was internally inconsistent. *Professional Care, Inc.*, 271 NLRB 324, 324 fn. 2 and 328 (1984). He appeared shaky about his testimony and exceedingly nervous. Although Vollers III claimed he first wore a Union t-shirt on October 12, the day of his workers' compensation back injury, I find it unlikely as the campaigning was over by Labor Day. Additionally, Vollers III vaguely testified that he attended a meeting with the consultant in the Fishbowl in October but no meeting took place past the beginning of September. Additionally, no one corroborated that he left Respondent's meeting early.

Vollers III also testified he asked Wildman for a second chance, despite his claim he asked for permission and received it; as a result, Vollers III's statement to Wildman is more of an admission of guilt. Further, Vollers III requesting permission to leave the floor to take a call at the beginning of the shift also demonstrates some level of knowledge of cell phone policy. I also find that his discussion of the ultimate cell phone incident contradicted himself at points.

I find that Vollers III's statements to "Save a Tree" when supervisors handed him anti-Union pamphlets left no impression on Respondent. Supervisors apparently reported how associates responded to the flyers and even if Vollers III made the statement, it left no impression on Supervisor Reynolds.

2. *Wright Line analysis*

In applying *Wright* Line, supra, to Vollers III's termination, I first examine Vollers III's union activities and Respondent's knowledge thereof.

Because I discredit the alleged union activity for wearing a t-shirt and leaving a meeting, I look for any Respondent knowledge of Vollers III's limited union activities. When receiving the employer's pamphlet, Vollers III claimed he said, "Save a Tree." Even presuming that Vollers III made such a statement, it could have been an environmental statement and does not give notice that Vollers III was a Union supporter. *Emery Worldwide, a Div. of Consolidated Freight Corp.*, 306 NLRB 318, 320-321 (1992).

General Counsel also argues Respondent had knowledge because Vollers II was a known union supporter and Vollers III sometimes rode to work with him. Nothing demonstrates any supervisory or managerial knowledge of their transportation habits. I also credit Boyd that Respondent had no idea that Vollers II filed the OSHA complaint on behalf of his son. *Brink's, Inc.*, 360 NLRB No. 136, slip op. at 1, fn. 3 (2014) (General Counsel did not prove employer knowledge); *Music Express East, Inc.*, 340 NLRB 1063 (2003).

I considered the disparate treatment evidence for animus towards Vollers III. The closest comparator is Jeff Walker, who also had poor production, failed to follow directives to work, and ultimately also had his cell phone out. He was terminated on July 7, 2015 (before Vollers III) and had no known union activity. (R. Exh. 19). I also place great weight on the testimony from both Mr. and Ms. McKinstry, who stated they knew not to use a cell phone on the production floor. Both testified about alleged statements made by Respondent and had no problem with stating something contrary to their fellow employees' interests. Vollers II also testified that he told fellow employees not to use their phones. Therefore, given Vollers III's lack of union activity and Respondent's thorough investigation, I cannot infer knowledge when Vollers III had little union activity and I cannot credit that he wore the union t-shirt on October 12. I therefore find little evidence of Union activity and no knowledge can be attributed to Respondent. General Counsel has not made a prima facie case here and I recommend dismissal of this allegation. *LM Waste Service Corp*., 357 NLRB 2234 (2011); *Stanford Linear Accelerator Center*, 328 NLRB 464 fn. 2 (1999); *Athens Disposal Co., Inc.*, 315 NLRB 87, 99 fn. 45 (1994).

XI. Dennis Young

The Complaint alleges that Respondent violated Section 8(a)(1) on about September 3, when HR Manager Boyd, in the present of Lynch, prohibited Young from discussing the Union on the production floor and told the employee such discussions violated Respondent's solicitation policy. In that conversation, Boyd also allegedly stated that any questioning of Respondent's position on the Union is rude and disruptive and prohibited employee from discussing the union on the production floor because it disrupts production. (Complaint ¶¶5(j)-(l)).

The Complaint also alleges four additional Section 8(a)(3) violations involving Young: About September 3, Respondent verbally warned employees Dennis Young (Complaint ¶7(i)). About October 9, Respondent suspended employee Dennis Young and/or on about October 13,

Respondent issued Young a written warning. (Complaint ¶7(j), as amended). About November 6, Respondent terminated employee Dennis Young by converting a November 2 written warning into a termination.

A. Facts

Boyd testified that, of the 140 employees terminated since July 1, 2014, the only known union supporter terminated was Dennis Young. Young worked for Respondent from August 26, 2013 until his termination on November 6, 2015. Young was a spar cap associate for approximately the last year. As spar cap associate, Young prepared molds, laid out materials including fiberglass and consumable materials; after the curing process, he demolded the blade. David Lynch was his floor supervisor; Scott Chisholm was his process coordinator. An August 5 review rated Young as proficient in his job. Comments included working well with his coworkers.

1. Young's union activities and Respondent's knowledge

In late June and early July, Young became involved with the Union's efforts to organize the facility and Respondent admitted it knew of his activities at that time. He went to meetings, where he listened to coworkers' concerns and learned about how to work on a volunteer organizing committee. He sometimes would wear a union button to work. He distributed union cards in the break room, primarily the west break room, before and after work and occasionally at other employees' homes. When in the break room distributing cards, some floor supervisors were present. He denied ever giving cards to anyone in a working area or during working time.

Supervisor Lynch testified he was well aware of Young's union views, including Young's statement that he would be the first president of the local union. Young testified that he twice discussed Respondent's anti-union literature with Lynch. The first incident occurred at the tip end of the molds, a working area, during working time. Young asked Lynch about his stance on unionization of the facility. Lynch stated that he was a supervisor and had to support the company's values; although he did not see anything wrong with a union, he could not endorse it. Young said he thought it was funny that Respondent could take time out of the production day to distribute anti-union materials, but employees were not permitted to hand out anything on the shop floor. Lynch told him that the company was paying for the hours and they could what they wanted with his time.

Young also discussed unionization with floor supervisor Marty Brunsman. Young asked Brunsman's opinion of the union and received a response similar to Lynch's. Young shared with Brunsman his views about unionization, such as improving turnover and safety.

In response to Respondent's literature, Young wrote his own letters, which he distributed four or five times before work and break times. He denied that he handed out flyers in any working areas.

Young also attended a meeting led by Terry Van Huysen about the end of July or early August. The meeting was held in a conference room. Others associates were also present. Van Huysen first spoke about production and safety information and goals for the following year. He

then asked for questions, suggestions and any other topic. Young stated that a union in the facility could turn around safety and turnover and improve communication between management and associates. Van Huysen said that a union could help in some places but he did not feel that TPI needed a union.

In about August,[20] Young attended a meeting in the Fishbowl about unionization. Navarro, the hired consultant, conducted the meeting. About 10 to 12 other persons were present, including Process Coordinator for Eastmen Vincent Versteegh, and Tim Stewart, who was discussed above. Navarro told the group she would talk about the pros and cons of unionization and showed a video, which Young described as very anti-union. After the video she quoted Nelson Mandela. Young called her a hypocrite. She objected to the term and he apologized. He then rephrased his concern, which was that she never discussed the pros of unionization, only the cons. She said he knew what the benefits were. He said he did not think everyone knew the benefits and she did not explain what their rights were under the NLRA. At that point, Navarro opened a binder and gave a presentation about the employer's rights under the Act without providing rights of employees. Navarro, who appeared agitated to Young, dismissed the employees. As he walked out, Young, also agitated, said, "You know, it is crap like that that everybody out here should sign a union authorization card."[21]

About a day or two after the meeting, Supervisor Lynch took Young to HR Manager Boyd's office. Boyd told him he was not in trouble, but they wanted to have a discussion about what happened after the presentation in the Fishbowl. Boyd said it was brought to their attention that Young was rude and disrespectful in the meeting. Young gave a short statement about what happened. Boyd told him that associates are supposed to treat invited guests with respect and dignity. Young said he understood but when people came in and made promises of what they were going to do, they should fulfill them. Young then said otherwise they were disrespected or lied to, which applied to the meeting. Boyd also said he was told that Young asked a gentleman to sign a union card. Young said he was talking in general and repeated what he said. Boyd then showed him a copy of the handbook with the solicitation policy highlighted. Boyd again reiterated that Young was not in trouble but wanted to review the policy with him. Young said he knew what the policy was and he was not soliciting on the shop floor. Boyd said that talking about the Union on the shop floor could be a distraction. Young replied that the handbook had no policy preventing talking about friends, family or football, so he had a right to talk about the Union. Young then suggested that Boyd turn on his computer and go to the NLRB website to see what employer and employee rights were, so that everyone was clear about their right. Boyd said he did not think they need to do that and again told Young he was not in trouble. Boyd then stood up, reached out to shake Young's hand; he said, "Here's a little bit of irony for you" and wished Young a happy Labor Day. Young said, "Which wouldn't have been made possible without the hardworking men and women of the union of our past." Young left and returned to work. Respondent denied that any discipline was given for these events. (Tr. 761-Boyd).

[20] Stewart testified the meeting took place on August 31. Stewart first testified that he did not recall much about the meeting, and then was led into the specifics.

[21] Young initially substituted the term "reason" instead of crap in his testimony about the statement. He also may have said bullshit or bull crap, but denied swearing at Navarro.

2. Disciplinary actions leading to termination

Young was ultimately terminated for crossing a safety barrier without permission after Respondent levied within three months three other violations: a previous crossing of the safety barrier without permission; using his cell phone and sleeping in a meeting; and leaving the plant without permission.

a. First crossing of the safety barrier

The plant floor has specific areas for walkways. In addition, when certain machines are in use or the molds are being flipped, safety barriers are erected on the floor to signal to employees not to cross in those areas. The safety barriers consist of retractable roll-out straps or chains, which are in place when certain machines are used or when the molds are flipped. If a mold, which could weigh in the tons, falls and lands on a person, that person is likely to die. If an employee wishes to cross the safety barrier, the employee must first ask for permission to cross from an authorized person.

On August 11, between the "root of mold 5" and the south wall, Young admittedly crossed a safety barrier while a blade was undergoing infusion with a 2KM machine on the west side of the break room doors. He wanted to reach his locker to "put my stuff away to go home." He did not ask anyone for permission to cross the safety barrier.

On August 12, Operations Manager Finchum spoke with Young about crossing the safety barrier. Young testified that his recollection of the conversation was vague, but consisted of a reminder to request permission to cross a safety barrier. Young apologized and said he would comply. Finchum's email conversation notes, dated August 14, reflect that Young was warned he could be disciplined if it occurred again. (GC Exh. 16). Finchum's notes corroborate that Young understood that the matter was serious and Young agreed not to do so again.

At the time Young did not believe he was receiving any discipline for the incident, yet a few days later a supervisor gave him a "write-up." The supervisor informed him that a number of people who crossed the barrier that day also received write-ups.

b. Alleged sleeping in a meeting and using his cell phone

On September 26, Young attended a weekly safety meeting.[22] He said he "may" have had his cell phone out at the beginning of the meeting and denied sleeping through the meeting as he snores loudly. Respondent contends that Young testified that he admitted to nodding off. However, the testimony is not as clear as an admission of dozing off; instead, it is more of a generalized statement that "people" might have head bobs when coming into an air conditioned office from the warm plant floor. (Tr. 400-401).

A supervisor, who was not called by Respondent to testify, told Shift Supervisor Lynch that Young was asleep through the meeting. Lynch found Young in the work area and gave him a counseling for sleeping through the meeting and using his cell phone. Young denied the

[22] Respondent also conducts daily meetings and safety is discussed at a number of these meetings.

accusations and Lynch told him he was being counseled. Young was not sure whether he received a paper to sign for the meeting. Lynch did not tell him what he allegedly missed during the meeting.

c. Leaving work early[23]

On October 8, Young left work early. Although he did not have scheduled leave, he testified he asked Process Coordinator Scott Chisholm to leave to attend to some marital issues with his wife, who also works in the plant. Young said that Chisholm gave him permission to do so, but asked whether Supervisor Lynch knew he was leaving. Young said he had not done so yet, but wanted to know where Lynch was. Chisholm said Lynch was in a meeting. Young first offered to find him and according to Young, Chisholm offered to find him. Lynch, however, testified that Chisholm called him and told him that Young said, "You've got plenty of help, I'm outta here."

Respondent disputes that Young had permission from Chisholm to leave because Chisholm was a team leader/process coordinator, not a supervisor. (Tr. 404). That Young told Chisholm something about leaving is not in dispute. Boyd conducted an investigation about Young leaving early without informing Supervisor Lynch. At hearing, Boyd contended that he spoke with Chisholm, who did not have authority to allow Young to leave early. Chisholm was not called to testify; between the April and May hearing dates, Respondent terminated his employment for allegedly falsifying documents.

On October 9, Supervisor Lynch took Young to the Human Resources office, where they met with Danielle Williams, HR Generalist Wildman and Production Manager Beck.[24] Wildman left shortly. Beck told Young that they learned he left early. After Young said he had done so, Beck asked why. Young explained he was having marital problems and he and his wife, who also worked there, left to have a discussion. Beck said the policy was to notify the supervisor, not the team leader or process coordinator, when leaving early. He suspended Young pending an investigation. Young then clocked out and left.

After Respondent failed to notify Young of when he could return from suspension, he called Williams on October 12. She put him on hold and then told him Boyd had not had time to investigate, so call her back the next day.

Respondent's investigation on that day noted two items: Based upon Young's report that he told Chisholm he was leaving, Young stated he only had to notify his supervisor based upon his experience in molding and Respondent was not sure it had been consistent in all areas of the plant; and, Chisholm contacted Supervisor Lynch by radio with Young present and reported Young was leaving, but Lynch did not say Young could not leave. (GC Exh. 20). Young's disciplinary history also reflects that he was recently coached for disrespect. Respondent then

[23] Supervisor Lynch testified that, on a previous occasion, Young left his work area to have a second lunch with his wife. Lynch did not give him any discipline.

[24] Beck testified that he could not recall whether Young was suspended or given a written warning, but his recommendation to Boyd was to terminate Young.

decided to issue Young a written warning for leaving the premises without permission. (GC Exh. 20).

About 4:30 p.m. on October 12, Williams called Young and told him to report to work the following day. On October 13, Supervisor Lynch gave him a written performance warning, which instructed him to ensure to notify the supervisor and not the process coordinator if he left early. (Tr. 377; GC Exh. 17). Young first saw such a policy posted on a bulletin board on October 13. The policy was not posted after that day. Although the discipline was booked as a written warning, Young was not paid for the two scheduled days he was not permitted to work. (Tr. 406). Young continued to openly support the Union after he returned to work.

Respondent also contends it terminated two other employees who left work without permission after Young's incident.

d. Second crossing of a safety barrier

On October 30, Young received a written warning for crossing a safety barrier without permission. Young crossed the safety barrier on October 29, at the tip of mold area 5, the same spot where he previously crossed and received a warning. He wanted to put away his tools in his locker because he and other coworkers would be working in a confined area. He said he did not even realize a safety barrier was up. He was able to identify on the plant map where he crossed and where he saw the work performed. However, his explanation was confusing about getting attention of someone who was able to give permission to cross. Instead, he crossed without permission. When he walked back to his work area, Supervisor Tony Gray asked him who gave him permission to cross the barrier. Young explained what happened and Gray told him that he intended to write him up for the violation.

On October 30, when Gray gave him the written warning, he asked Young to sign the document. Young refused and told Gray it was "bullcrap" because he was not in any danger and he was just putting his tools away. Young said it was not a valid write up because no one was stationed at the barrier to give permission. Nothing was said about a possible termination.[25]

A few days after Young received discipline, Boyd and Operations Manager Finchum learned of Young's October 30 warning. Boyd conducted an investigation and examined Young's disciplinary history. He and Finchum discussed what happened and wanted to ensure that they were following all correct procedures due to Young's known union support. On November 6, at about 10:15 a.m., Boyd recommended via email to Finchum that Young be terminated. Boyd summarized that Young had three prior disciplines within three months and disregarded company policies. Finchum agreed with Boyd's recommendation. (R. Exh. 9). Both denied that Young's union activity played a role in the recommendation.[26]

[25] Boyd testified that Gray gave everyone a written warning, but Gray was not familiar with Young's disciplinary history because he was not Young's supervisor. (Tr. 757).

[26] Boyd stated that crossing the safety barrier was an intentional act, but failing to wear safety glasses might not be intentional.

On November 6, Production Manager Beck, with Supervisor Lynch present, called Young into his office. Beck started with questioning about Young crossing the safety barrier. Young gave his explanation and Beck reminded him about the policy. Young said he could see the paste machine was at the opposite end and he was not in any danger. Beck said it did not excuse Young's behavior. Young said no one was present at the barrier, plus he did not feel the company should block fire exists and access to break rooms and the bathrooms. Beck said Young had four write-ups in the previous three months and the company no longer needed his services.

Respondent's documentation reflects it terminated Young for 4 performance "interventions" in previous 3 months. It lists the two safety barrier crossings, sleeping and using the cell phone during a safety meeting, and leaving work "without direct notification/ authorization of a supervisor." (GC Exh. 20).

Throughout his testimony about both safety violations, Young testified he was never in danger. He also testified that employees have judgment in making safety decisions. (Tr. 408-409).

5. Other disciplinary actions for crossing the safety barrier

After Young's discipline, Respondent posted a policy about safety crossings. Young testified that he saw employees cross safety barriers on a daily basis and he never saw anyone received discipline for doing so.

Ms. McKinstry has seen people crossing barriers and reported to supervisors. She witnessed Supervisor Scott Gemell instructing people who crossed a barrier to turn around. She did not know whether they received any discipline. Ms. McKinstry, who serves on the safety committee, testified she would not do so herself.

Vollers II knew of no one else being disciplined or terminated for safety violations, including crossing barriers. However, he had been authorized by team leads/process coordinators and supervisors to cross.

Respondent maintained it terminated four others for violating safety policies and none were known union supporters. In its brief, it contends that Young should be terminated for violating the safety policy twice, which would be similar to Leah Smith. See GC Exh. 77. I find no such similarity. On November 11, Respondent terminated Smith for her second violation of falsifying a company document. She had other disciplinary actions as well, including a May 4, 2014 "written verbal warning" for walking under a fork truck that was moving a blade.

Other employees were treated in a more lenient manner for safety violations. One example was Mandi Stone. Maintenance Manager McGlothlin gave Stone a written warning for a safety violation on March 9, 2015 and removed her from her position as an assistant team leader. The March incident was standing on the railing of staging while trying to remove a clog on the nozzle tip with a knife; she additionally was not wearing proper protective equipment. She incurred two further safety violations, on May 30 and June 6 respectively. For the two violations, she received a two-day suspension, which was documented on June 5. The May 30

violation was working with a resin machine and not wearing proper protective equipment. The June 6 violation was for operating a powered pallet jack with one hand and holding a bucket of resin in the other, despite the requirement to operate equipment with two hands. Stone then claimed she had not been trained of protective gear. Throughout this period Stone had additional performance issues. She was ultimately terminated on June 22 for not answering her radio and mouthing off to the team leader on June 19 and the continuing performance problems. (GC Exh. 78).

B. Analysis

In discussing Young's ultimate termination for safety violations, I first discuss the September 3 counseling and the disciplines for leaving early and for sleeping in the meeting. For all *Wright Line* discussions, it is well established that Young was engaged in union and/or protected concerted activities and Respondent admittedly had knowledge.

1. September 3 counseling for conduct in Navarro's meeting

I credit that Young used some intemperate language to describe the presentation in front of employees. Respondent admits Young received a counseling on September 3, but denies it was due to his Union activities or that it was considered discipline. I disagree. He spoke up directly in front of other employees, pointed out that the presentation appeared one-sided and asked Navarro to point out the benefits of unionization. As to whether it was discipline, again Respondent used this counseling as a basis for further discipline. These facts establish a prima facie case for a Section 8(a)(3) violation as the conversation for which Young was disciplined entailed union activity.

To determine whether Respondent was justified in giving Young a counseling because of his comments to Navarro, I consider whether Young's conduct exceeded the protection of the Act. *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979). "When . . . an employer defends a disciplinary action based on employee misconduct that is part of the res gestae of the employee's protected activity, the *Atlantic Steel* test applies." *Public Service Co. of New Mexico*, 364 NLRB No. 86 (2016), slip op. at 7 (2016). The test requires balancing four factors:

1) The place of the discussion;
2) The subject matter of the discussion;
3) The nature of the employee's outburst; and,
4) Whether the outburst was provoked in any way by an employer's unfair labor practice.

Atlantic Steel, supra.

Regarding the first *Atlantic Steel* factor, the place of the discussion was the Fishbowl, not on the work floor. *Plaza Auto Center, Inc.*, 360 NLRB No. 117, slip op. at 7 (2014). Although other employees were present, it did not affect Respondent's interest in maintaining order and discipline away from the work floor. Respondent set up a group meeting and cannot now complain that others heard his comments. *In re Kiewit Power Constructors Co.*, 355 NLRB 708, 709 (2010), enfd. 652 F.3d 22 (D.C. Cir. 2011). This factor weighs in favor of protection.

Regarding the second *Atlantic Steel* factor, the subject matter of the discussion, Young's outburst occurred during Navarro's anti-union presentation. Young responded in front of other employees about the one-sided nature of the presentation. His comments constituted protected concerted activity as he discussed the perceived one-sided presentation and clarify employee rights under the Act in front of other employees.

Regarding the third *Atlantic Steel* factor, the nature of the outburst, the Board uses an objective standard to determine whether the conduct was threatening. *Plaza Auto Center, Inc.*, 360 NLRB No. 117, slip op. at 3. Not every impropriety committed during protected activity puts an employee beyond the Act's protection. Id., slip op. at 7. Respondent's own assessment found Young's behavior considered rude and not the standard provided to guests, but Respondent did not mention threatening. Regarding Young's use of "bullshit" or "crap," single use of profanity during protected concerted activity does not lead to loss of protection of the Act. *Corrections Corporation of America*, 347 NLRB 632, 636 (2006); *Wal-Mart Stores, Inc.* 341 NLRB 496, 807-808 (2004), enfd. 137 Fed.Appx. 360 (D.C. Cir. 2005) (employee used profanity to describe new system and did not direct it towards supervisors). Navarro did not wish to continue the meeting when challenged, but Young did not shut down the meeting and was not asked to leave. Compare *Public Service Co. of New Mexico*, supra, slip op. at 8. This factor therefore weighs in favor of protection.

Regarding the fourth *Atlantic Steel* factor, General Counsel agrees that the conduct was not provoked by an unfair labor practice. This factor therefore does not weigh in favor of protection. *Kiewit Power*, 355 NLRB at 710.

The first three *Atlantic Steel* factors, place of outburst, the subject matter discussed, and the nature of the employee outburst, favor protection for Young. Only the fourth factor favors non-protection. Young's conduct therefore did not exceed the protection of the Act. The counseling therefore violated Section 8(a)(3) because Young spoke out exuberantly about unionization.

2. Sleeping and using the cell phone in the meeting

I credit Young's testimony here. He seemed certain that he was not asleep in the meeting. As Respondent had no first-hand witness testify that Young was sleeping or using his cell phone during the meeting, I am not persuaded that the discipline was appropriate. Respondent's position is further undermined by failing to fill Young in after the meeting about the supposedly important safety information that he would have missed if sleeping.

As the facts establish union activity and knowledge, I also find that the facts establish animus. Although I do not rely upon the handbook portion stating that a union is not necessary, I look towards Navarro's presentation. An employer's comments may not violate the Act, but still can establish animus towards union activity. *Carnegie Linen Services*, 357 NLRB 2222, 2228 (2011),[27] rev. denied 504 Fed. Appx. 7 (2d Cir. 2012). Respondent conducted a campaign

[27] The case cites *Lampi LLC*, 327 NLRB 222 (1998) and *Affiliated Foods, Inc.*, 328 NLRB 1107 (1999).

against unionization and, as seen throughout this case, it had various means of attempting to shut it down.

Respondent also relied upon the prior discipline for Young's interaction with Navarro as a basis to progressively discipline Young. When an employer relies upon previous unlawful discipline to give further discipline, the new discipline is also unlawful. *St. George Warehouse, Inc.*, 349 NLRB 870, 878 fn. 27 (2007).

3. Leaving without permission

The facts demonstrate that Young told his process coordinator he intended to leave. Respondent's rule, requiring notification of a supervisor to leave, was not clear here. Respondent contended that a process coordinator, who was not a supervisor in the legal sense, was not authorized to approve leaving early. Apparently it was not clear to the process coordinator, as I credit Young that the process coordinator told him he would advise the supervisor he was leaving. Young was consistent in his testimony and his explanations to Respondent, and I therefore credit his explanation. Furthermore, Respondent's documentation (GC Exh. 20) reflects Chisholm notified Supervisor Lynch by radio that Young was leaving and Respondent was not sure it was consistent in enforcing the rule.

As before, evidence of animus includes Respondent citing the prior counseling for Young's discussion with Navarro. I also infer animus because Respondent did not have any written policy about advising a supervisor regarding leaving early instead of a process coordinator. After Young received discipline for leaving early, Respondent posted a rule and then later terminated two employees for leaving without permission. The only evidence of the rule occurred after Young received discipline. *Livingston Pipe & Tube*, 987 F.2d 422, 427 (7th Cir. 1993), enfg. 303 NLRB 873 (1991).

Enforcement of the rule after a posting is not the same as establishing the rule existed when it disciplined Young. Because Respondent admittedly was not sure that the rule existed in all areas of the plant, the reliance upon the rule is pretextual. *Rowland Trucking Co.*, 270 NLRB 247, 254-255 (1984). Respondent also relied upon prior unlawful progressive discipline, the discussion with Navarro. Such reliance undermines the discipline as well. *St. George's Warehouse*, 349 NLRB at 878 fn. 27.

I therefore find that Respondent's suspension of Young for leaving without permission violated Section 8(a)(3) and must be rescinded.

4. Safety violations for crossing the safety barrier without permission

Regarding the first violation, Respondent's documentation shows some enforcement of the policy. Given the nature of the discipline and the anecdotal evidence of employees who state that they would not cross the barrier, Respondent meets its burden of proof that it would disciplined Young. I do not find that a verbal warning is more severe than other discipline and the documentary evidence does not show that Respondent relied upon the discipline involving Navarro to give this warning.

However, the second violation for crossing constitutes a violation of Section 8(a)(3). Young admittedly and knowingly crossed the safety barrier again without permission to reach his locker. In between the safety violations, he incurred two disciplines, both of which I found unlawful. Respondent therefore cannot rely upon the claimed sleeping incident and "leaving without permission" disciplines in its progressive discipline, which led to Young's termination. *St. George's Warehouse*, 349 NLRB at 878 fn. 27.

Given the prior findings of activity, knowledge and animus, I look towards Respondent's defense that it consistently enforced its safety policies for a second violation in crossing the safety barrier. I find that Respondent did not consistently enforce its safety policies. At hearing, Respondent differentiated between "willful" or "intentional" safety violations and those who were not "willful" and might need re-education. Stone, as an example, was an assistant team leader who knew or should have known about the need for safety, ignored policies repeatedly, and was demoted. It was not until the last safety discipline for failure to wear protective gear, among other issues, that Stone claimed she had not been trained. Respondent's documentation demonstrates an employee who was attempting short cuts, including safety. Given Respondent's claimed interests in safety, this discipline cannot be differentiated as willful versus non-willful. Even accepting Young violated safety policies twice, Young was treated disparately: Termination was a severe punishment compared to other employees and violated Section 8(a)(3).

XII. Vollers II and Photography

The Complaint contains two allegations relevant to Vollers II: On November 11, Operations Manager Finchum, the presence of Production Manager Beck and Manager Reynolds, prohibited an employee from taking any photographs inside Respondent's facility and accused an employee of coercing workers to take photographs, in retaliation for the employee's support for the Union, and threatened to terminate the employee if the employee continued to photograph within the facility. (Complaint ¶¶5(m) and (l)). I also consider whether Respondent disparately applied its overly broad recording policies.

A. Facts

Vollers II was active in the unionization efforts. He wore t-shirts and attended meetings. In one meeting conducted by Navarro, Vollers II spoke up and gave her "static" about her statements, including her representations about unionization at Hostess. They spoke after the meeting. Vollers II apologized for his conduct and Navarro said he had nothing to worry about. He complimented her on her knowledge and presentation skills and said he respected Van Huysen.

On November 11, Vollers II met with Manager Reynolds, Operations Manager Finchum and Production Manager Beck. After Finchum instructed Vollers II to take a seat, Finchum said someone in the plant said Vollers II was taking pictures in the plant and providing them to OSHA.[28] Vollers II denied taking pictures.

[28] Respondent contended at hearing that Vollers II brought up OSHA.

Finchum then said Vollers II was coercing others to take pictures. Vollers II again denied and said he told others that they could be terminated for taking pictures. Finchum said he could be terminated for taking pictures due to GE's contract[29] and said video surveillance could be checked. Finchum said the facility was safe and an OSHA representative told him that it was a waste of time to be there. Vollers II raised that the respirators' particulate filters were not changed daily as required. He also talked about the cell phone policy, which he said was only partially posted. Beck said he would provide Vollers II a copy. Finchum testified that Vollers II did not claim he was taking any pictures for safety reasons.

Operations Manager Finchum testified that the GE contractual provisions for proprietary information prohibited anyone from taking pictures in the facility. However, Finchum also testified that an employee would not receive discipline for taking photos of an unsafe condition within the plant. (Tr. 850). Beck similarly denied that taking photos of an unsafe condition were a violation of the policy and gave an example of one employee who turned in a photo as a safety observation without receiving any discipline. (Tr. 1039).

Finchum further denied that employees were prohibited from using cell phones during work on the work floor except when it is disrupting work and is uniformly enforced. (Tr. 851). In response to leading questions, Beck clarified that employees are permitted to carry their cell phones on the floor, but are not permitted to use them on the production floor. (Tr. 1040). Beck could not recall an instance when he had to tell an employee a second time to put away the phone.

B. Analysis

I credit Vollers II's version of the November 11 conversation and that Finchum referenced OSHA, but nothing about the Union. I also credit that Finchum said Vollers II could be terminated for taking pictures, but Vollers II made the statement first. See *S.E. Nichols, Inc.*, 294 NLRB 556 fn. 2 (1987) (credibility of current employee reliable because it is given against his interests). Further, I find that, if Respondent was serious about the allegations because of its contractual obligations for GE's proprietary rights and trade secrets, Respondent would have checked the video cameras to confirm that Vollers II was indeed taking pictures.

I find Finchum's explanation that Respondent would not take disciplinary action a shift in Respondent's policy on recording and photographing in the facility. The policy had a blanket prohibition against photography, which Finchum verbalized, yet Finchum later gives an exception for photography for safety. Thus, Respondent changed its position from discussing the matter with Vollers II, which would have been consistent with its policy, and the hearing.

Respondent argues that Vollers II never received any discipline in relationship to the rumor. Indeed, the allegation is that the meeting was in retaliation for Vollers II's union support. I cannot find any evidence to support this conclusion, nor does General Counsel's brief argue for this conclusion. I therefore recommend dismissal of this allegation.

[29] R. Exh. 5, pp. 14-15.

General Counsel's argument is that Finchum told Vollers II not to take pictures on the work floor. I find that this statement is a reaffirmation of an unlawful policy and finding it unlawful is the same as the previous finding that the rule is unlawful.

As to the threat of termination, Vollers II first made the statement that he told employees that they could be terminated for taking pictures. Finchum then directed the termination threat towards Vollers II. Because of Finchum's shift in testimony about the rule and whether employees could take photos for safety purposes, the statement is an unlawful threat. Finchum directed the termination discussion towards Vollers II and I further find it was based upon the discussion of taking photographs for OSHA purposes. Although Respondent did not issue discipline, the threat of enforcement of an unlawful rule that chills employee activity violates Section 8(a)(1). See generally *Long Island Association for AIDS Care*, 364 NLRB No. 28, slip op at 1 and 7.

CONCLUSIONS OF LAW

1. Respondent admits, and I find, that it is an employer within the meaning of Section 2(2), (6) and (7) of the Act.

2. The International Brotherhood of Electrical Workers is a labor organization within the meaning of Section 2(5) of the Act.

3. At all material times, the following individuals have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act: Allen Finchum; Ken Beck; Luke Coady; Dale Reynolds; Kenneth McGlothlin; Scott Illingworth; David Lynch; and Cleodis Boyd.

4. At all material times, Emily McMahon has been an agent of Respondent within the meaning of Section 2(13) of the Act.

5. The following handbook provisions are overly broad and violate Section 8(a)(1) of the Act:
    a. Solicitation, including a work rule prohibiting early access to the facility;
    b. Media Relations;
    c. Confidentiality;
    d. Social Media;
    e. Recording Devices;
    f. Cell Phones; and,
    g. Outside Employment and Vendor Relationships.

6. Respondent violated Section 8(a)(1) of the Act by enforcing an unlawful Solicitation policy, including a work rule prohibiting access to the facility except during shifts.

7. Respondent promulgated and maintained an unlawful no talking rule in violation of Section 8(a)(1) of the Act.

8. Respondent coercively told employees that they could not talk about the Union, in violation of Section 8(a)(1).

9. On July 1, Respondent coercively threatened its employees with unspecified reprisals in response to their union and/or other protected concerted activities.

10. On July 1, Respondent counseled Brian McKinstry in violation of Section 8(a)(3).

11. On August 12, Respondent:

    a. Disciplined Brian McKinstry in violation of Section 8(a)(3);
    b. Enforced its unlawful solicitation policy against Brian McKinstry in violation of Section 8(a)(1).

12. On August 13 and August 21, Respondent:

    a. Enforced a no talking rule and disciplined Tammy Farver, in violation of Section 8(a)(1);
    b. Disciplined Tammy Farver, in violation of Section 8(a)(3) and (1).

13. On August 5 and August 13, 2015 respectively:

    a. Respondent counseled and gave a written warning to its employee Cindy Mikkelson for solicitation and early access to the facility in violation of Section 8(a)(3) and (1); and,
    b. Respondent enforced its unlawful solicitation policy and early access to the facility rule against Cindy Mikkelson in violation of Section 8(a)(1).

14. On July 14 and August 21, 2015 respectively, Respondent counseled and gave a written warning to its employee Tim Stewart:

    a. For solicitation, in violation of Section 8(a)(3);
    b. Enforced its unlawful no solicitation policy, in violation of Section 8(a)(1).

15. Respondent unlawfully disciplined and terminated Dennis Young in violation of Section 8(a)(3) and (1) of the Act.

16. The unfair labor practices above affect commerce within the meaning of Section 2(6) and (7).

17. Except as set forth above, Respondent has not violated the Act in any manner alleged in the complaint.

REMEDY

To remedy the harm caused by the violations found, Respondent must post a notice to the employees attached as Appendix B and take affirmative actions. Respondent must rescind or revise the unlawful handbook provisions and all unlawful disciplinary actions.

Respondent must make Dennis Young whole for the losses suffered due to its unlawful conduct. The make whole remedy shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (195), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), the Respondent shall compensate Dennis Young for search-for-work and interim employment expenses regardless of whether those expenses exceed his interim earnings. Search-for-work and interim expenses shall be calculated separately from taxable net back pay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), the Respondent shall compensate Dennis Young for the adverse tax consequences, if any, of receiving lump sum back pay awards, and, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), the Respondent shall, within 21 days of the date the amount of back pay is fixed either by agreement or Board order, file with the Regional Direction for Region 18 a report allocating back pay to the appropriate calendar year for Young. The Region Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

General Counsel requests that Operations Manager Finchum read the notice to employees during working time to remedy the unfair labor practices. The Board orders extraordinary remedies, such as public notice readings, when the remedies are necessary dissipate the coercive effects of the unfair labor practices. *In re Federated Logistics and Operations*, 340 NLRB 255, 256 (2003), rev. denied, enfd. 400 F.3d 920 (D.C. Cir. 2005). To warrant an extraordinary remedy, the unfair labor practices are "numerous, pervasive and outrageous." Id., citing *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473 (1995) (internal quotations omitted).

More recently, notice readings were warranted for serious and persistent multiple unfair labor practices. *1621 Route 22 West Operating Co. (Somerset II)*, 364 NLRB No. 43, slip op. at 5 (2016); *Affinity Medical Center*, 362 NLRB No. 78, slip op. at 1 (2015). The notice reading is "a minimal acknowledgement of the obligation . . . imposed by law and provides employees with some assurance that their rights under the Act will be respected in the future." *Affinity Medical*, supra. Also see *Farm Fresh Co.*, 361 NLRB No. 83 (2014).

A notice reading is not warranted here. Despite the number of violations in this one decision, Respondent has no prior history of violations. Compare *Ozburn-Hessey Logistics, LLC (Ozburn IV)*, 362 NLRB No. 180 (2015) (notice reading ordered for "gravely, repeatedly, and in a variety of ways" violated the Act); *Somerset II*, supra.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[30]

ORDER

1. Cease and desist from:

   a. Coercively threatening employees because of their union and/or protected concerted activities.

   b. Telling employees that they may not discuss their discipline with other employees.

   c. Unlawfully enforcing our Solicitation Rule against employees because of their union and/or protected concerted activities.

   d. Maintaining the following handbook rules as set forth in this decision:
      i. Media Relationships;
      ii. Social Media, as identified below;
      iii. Confidentiality
      iv. Outside Employment and Vendor Relationships
      v. Solicitation and the work rule Limiting Access to the Facility During Work Shifts
      vi. Recording Devices and Cell Phones

   e. Promulgating and maintaining a rule prohibiting employees from talking about the union or other protected concerted activities while allowing other nonwork related discussions by employees.

   f. Enforcing an unlawful no talking rule.

   g. Threatening employees for violating an unlawful no talking rule.

   h. Threatening employees with further discipline for violating unlawful rules.

   i. Issuing discipline, including counselings, verbal warnings, written warnings, suspensions and termination, or otherwise disciplining employees because they engaged in union or in other protected concerted activities protected by the Act.

   j. Issuing discipline, including but not limited to counselings and written warnings, for early access to the facility and violation of the solicitation rules.

[30] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

k. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative actions necessary to effectuate the policies of the Act:

a. Within 14 days of the Board's order, revise or rescind the following policies:
   i. Media Relationships;
   ii. Social Media
      1. Adversely affecting Respondent or its employees
      2. Prohibiting posting of internal reports, policies, procedures and other internal business-related confidential information
      3. "Be respectful"
      4. "Post only appropriate and respectful content"
   iii. Confidentiality
   iv. Outside Employment and Vendor Relationships
   v. Solicitation and the work rule Limiting Access to the Facility During Work Shifts
   vi. Recording Devices and Cell Phone.

b. Furnish all current employees with inserts for the current employee handbook that (1) advise that the unlawful rule has been rescinded, or (2) provide the language of a lawful rule; or publish and distribute revised handbooks that (1) do not contain the unlawful rule, or (2) provide the language of the lawful rule.

c. Within 14 days from the date of this Order, rescind the counselings, dated July 1 and August 12, and the written warning dated August 21, of Brian McKinstry and remove any reference to these disciplinary actions from its records and files, and within 3 days thereafter, notify him in writing that it has taken this action and that his counselings and written warning will not be used against him in the future in any manner.

d. Within 14 days from the date of this Order, rescind the counseling and warning of Tammy Farver, dated August 13 and 21, 2015 respectively, and remove any reference to her counseling and warning from its records and files, and within 3 days thereafter, notify her in writing that it has taken this action and that her counseling and warning will not be used against her in the future in any manner.

e. Within 14 days from the date of this Order, rescind the counseling and warning of Tim Stewart, dated July 14 and August 21 respectively, and remove any reference to the counseling and warning from its records and files, and within 3 days thereafter, notify her in writing that it has taken this action and that her counseling and warning will not be used against him in the future in any manner.

f. Within 14 days from the date of this Order, rescind the August 4 and August 12, 2015 counselings of Cindy Mikkelson and remove any reference to her counselings from its records and files, and within 3 days thereafter, notify her in

writing that it has taken this action and that her counselings will not be used against her in the future in any manner.

g. Within 14 days from the date of this Order, rescind the counselings, verbal warning, suspension and termination of Dennis Young and remove any reference to these disciplinary actions from its records and files, and within 3 days thereafter, notify him in writing that it has taken this action and these disciplinary actions will not be used against him in the future in any manner.

h. Within 14 days from the date of this Order, offer Dennis Young immediate and full reinstatement to his former position of employment, or if his position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights or privileges previously enjoyed.

i. Make Dennis Young whole for any loss of wages or benefits suffered as a result of the discrimination against him in the manner set forth in this decision.

j. Compensate Young for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 18, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years(s).

k. Within 14 days after service by the Region, post at its Newton, Iowa facility copies of the attached notice marked "Appendix B."[31] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 1, 2015.

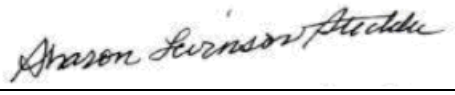
l. Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including

[31] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.

m. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated Washington, D.C. September 22, 2016



Sharon Levinson Steckler
Administrative Law Judge

APPENDIX A

Respondent's Social Media Guidelines (GC Exh. 3, pp. 6-7)

At TPI, we understand that social media can be a fun and rewarding way to share your life and opinions with family, friends and co-workers around the world. However, use of social media also presents certain risks and carries with it certain responsibilities. To assist you in making responsible decisions about your use of social media, we have established these guidelines for appropriate use of social media.

Guidelines

In the rapidly expanding world of electronic communication, *social media* can mean many things. *Social media* includes all means of communicating or posting information or content of any sort on the Internet, including to your own or someone else's weblog or blog, journal or diary, personal website, social networking or affinity website, web bulletin board or a chat room, whether or not associated or affiliated with TPI, as well as any other form of electronic communication.

The same principles and guidelines found in TPI's policies and three basic beliefs apply to your activities online. Ultimately, you are solely responsible for what you post online. Before creating online content, consider some of the risks and rewards that are involved. Keep in mind that any of your conduct that adversely affects your job performance, the performance of fellow associates or otherwise adversely affects members, customers, suppliers, people who work on behalf of TPI or TPI's legitimate business interests may result in disciplinary action up to and including termination.

Know and follow the rules

Carefully read these guidelines, the TPI Code of Conduct and Ethics Policy, and the other policies in this Handbook, and ensure your postings are consistent with these policies. Inappropriate posting that may include discriminatory remarks, harassment and threats of violence of similar inappropriate or unlawful conduct will not be tolerated and may subject you to disciplinary actions up to and including termination.

Be respectful

Always be fair and courteous to fellow associates, customers, members, suppliers or people who work on behalf of TPI. Also, keep in mind that you are more likely to resolve work-related complaints by speaking directly with your coworkers or Human Resources than posting complaints to a social media outlet. Nevertheless, if you decide to post complaints or criticism, avoid using statements, photographs, video or audio that reasonably could be viewed as malicious, obscene or threatening or intimidating that disparage customers, members, associates or suppliers, or that might constitute harassment or bullying. Examples of such conduct might include offensive posts meant to intentionally harm someone's reputation or posts that could contribute to a hostile work environment on the basis of race, sex, disability, religion or any other status protected by law or company policy.

Be honest and accurate
Make sure you are always honest and accurate when posting information or news, and if you make a mistake, correct it quickly. Be open about any previous posts you have altered. Remember that the Internet archives almost everything; therefore, even deleted postings can be searched. Never post any information or rumors that you know to be false about TPI, fellow associates, members, customers, suppliers, people working on behalf of TPI, or competitors.

Post only appropriate and respectful content

- Maintain the confidentiality of TPI trade secrets and private or confidential information. Trade secrets may include information regarding the development of systems, processes, products, know-how and technology. Do not post internal reports, policies, procedures or other internal business-related confidential information.
- Do not create a link from your blog, website or other social networking site to a TPI website without identifying yourself as a TPI associate.
- Express only your personal opinions. Never represent yourself as a spokesperson for TPI. If TPI is a subject of the content you are creating, be clear and open about the fact that you are an associate and make it clear that your views do not represent those of TPI, fellow associates, members, customers, suppliers or people working on behalf of TPI. If you do publish a blog or post online related to the work you do or subjects associated with TPI, make it clear that you are not speaking on behalf of TPI. It is best to include a disclaimer such as "The postings on this site are my own and do not necessarily reflect the views of TPI."

Using social media at work
Refrain from using social media while on work time or on equipment we provide, unless it is work-related as authorized by your manager. Do not use TPI email addresses to register on social networks, blogs or other online tools utilized for personal use.

Retaliation is prohibited
TPI prohibits taking negative action against any associate for reporting a possible deviation from this policy or for cooperating in an investigation. Any associate who retaliates against another associate for reporting a possible deviation from this policy or for cooperating in an investigation will be subject to disciplinary action, up to and including termination.

For more information
If you have questions or need further guidance, please contact the HR Manager.

NLRB Statement
These Social Media Guidelines are intended to maintain TPI's reputation and legal standing, and are not intended to prohibit associates from exercising their right to engage in protected concerted activity under the National Labor Relations Act.

APPENDIX B

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with unspecified reprisals because you engaged in union and/or other protected concerted activities.

WE WILL NOT tell you that you cannot discuss your discipline with other employees absent a substantial justification for doing so.

WE WILL NOT unlawfully enforce our no solicitation rule against you because you engaged in union and/or other protected concerted activities.

WE WILL NOT maintain a rule that prohibits solicitation during non-working time or in non-working areas.

WE WILL NOT maintain a rule that limits solicitation or distribution to only immediately before a shift.

WE WILL NOT tell you that you may not solicit in the break areas with union cards or for other protected concerted activities.

WE WILL NOT maintain a rule that limits your access to the entire facility except to your shift.

WE WILL NOT discriminatorily enforce our rule about access to the plant property because you engaged in union or other protected activities.

WE WILL NOT discriminatorily promulgate and maintain rules that prohibit you from discussing unionization or other concerted activities protected by the Act.

WE WILL NOT maintain or enforce the following rules in our employee handbook:

- Recording devices and cell phones
- Media relations

- Social Media policies, as stated in the decision
- Confidentiality policy, except for maintaining confidentiality of trade secrets
- Outside Employment and Vendor Relationships

WE WILL NOT threaten you with termination if you take photographs in our facility.

WE WILL NOT threaten you with discipline to enforce rules and policies that are unlawful.

WE WILL NOT issue counselings, verbal warnings, written warnings, suspensions, terminations, or otherwise discipline you because you engage in union activities or other concerted activities protected by the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind or revise the following rules in our Employee Handbook:

- Solicitation and limiting early access to the facility
- Recording devices and cell phones
- Media relations
- Social Media policies, as stated in the decision
- Confidentiality policy, except for maintaining confidentiality of trade secrets
- Outside Employment and Vendor Relationships

WE WILL furnish you with inserts for the current Employee Handbook that (1) advise that the unlawful rules have been rescinded, or (2) provide the language of lawful rules or publish and distribute a revised Employee Handbook that (a) do not contain the unlawful rule or (b) provide the language of lawful rules.

WE WILL rescind or revise our "no talking" rule.

WE WILL, within 14 days from the date of this Order, remove from our files any reference that we counseled and warned Tammy Farver for violating our solicitation and no talking rules because of her union and/or protected concerted activities and WE WILL, within 3 days thereafter, notify her in writing that that this has been done and that the discipline will not be used against her in any way.

WE WILL, within 14 days from the date of this Order, remove from our files any reference that we counseled and warned Tim Stewart due to his union and/or protected concerted activities and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the disciplines will not be used against him in any way.

WE WILL, within 14 days from this Order, remove from our files any reference that we counseled Cindy Mikkelson for arriving early at the facility and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the counselings will not be used against her in any way.

WE WILL, within 14 days from the date of this Order, offer Dennis Young full reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make whole Dennis Young for any loss of earnings and other benefits resulting from his suspension and termination, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL compensate Dennis Young for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 18, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, within 14 days from the date of this Order, remove from our files any reference that we counseled, warned, suspended and terminated Dennis Young and WE WILL, within 3 days thereafter, notify him in writing that this has been done and the disciplinary actions will not be used against him in any way.

TPI IOWA, LLC

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Towle Building, Suite 790, 330 Second Avenue South, Minneapolis, MN 55401-2221

(612) 348-1757, Hours: 8 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/18-CA-164749 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (612) 348-1770.